# THE SPEAKER OF DEWAN UNDANGAN NEGERI OF SARAWAK DATUK AMAR MOHAMAD ASFIA AWANG NASSAR v. TING TIONG CHOON & ORS AND OTHER APPEALS

FEDERAL COURT, PUTRAJAYA
TENGKU MAIMUN TUAN MAT CJ
ROHANA YUSUF PCA
DAVID WONG DAK WAH CJ (SABAH & SARAWAK)
MOHD ZAWAWI SALLEH FCJ
NALLINI PATHMANATHAN FCJ
VERNON ONG LAM KIAT FCJ
ABDUL RAHMAN SEBLI FCJ
ZABARIAH MOHD YUSOF FCJ
HASNAH MOHAMMED HASHIM FCJ
[CIVIL APPEALS NO: 01(f)-20-08-2019(Q),
01(f)-21-08-2019(Q) & 02(f)-65-08-2019(Q)]
11 FEBRUARY 2020

***CONSTITUTIONAL LAW:*** *Legislature – State Assembly – Assemblyman voluntarily acquired Australian citizenship – Assemblyman renounced citizenship after five years and nominated as candidate for State Constituency – Returned as winner – Ministerial motion moved at Legislative Assembly of State of Sarawak ('Dewan') to disqualify Assemblyman – Whether Assemblyman disqualified for election to Dewan for voluntarily acquiring foreign citizenship – Whether disqualification removed or ceased to have effect – Whether disqualification removed merely by renouncing foreign citizenship – Whether Dewan clothed with jurisdiction to disqualify and remove Assemblyman – Whether there was conflict between art. 118 of Federal Constitution and art. 19(1) of State Constitution of Sarawak – Whether Dewan infringed doctrine of separation of powers – Whether court could question validity of decision taken by Dewan – State Constitution of Sarawak, art. 17(1)(g)*

The respondent, a Malaysian citizen of Sarawak origin, acquired the citizenship of Australia in 2010, but renounced it five years later. His renunciation was accepted by the Australian Government with effect from 4 April 2016. On 25 April 2016, the respondent was nominated as a candidate, together with three others, to contest the State Constituency of N17 Pujut in the Sarawak State General Election. As part of the nomination process for the General Election, the respondent affirmed a statutory declaration to the effect that he had not lost his eligibility to be a member of the Dewan, *ie*, he was not a person who was disqualified for election to the House. The respondent subsequently returned as the winner. A defeated candidate, one Hii King Chiong, filed an election petition against the

respondent seeking a declaration that the respondent was not duly elected or ought not to have been returned on the ground that he was a person who was 'disqualified for being elected as an elected member of the Dewan Undangan Negeri' for having voluntarily acquired Australian citizenship, under art. 17(1)(g) of the Constitution of the State of Sarawak ('Sarawak Constitution'). The appellants were not parties to the election petition. The Election Court struck out the petition on a technical ground without hearing the merits of the petition. Hii King Chiong did not appeal against the decision. Subsequently, on 12 May 2017, Dato Sri Wong Soon Koh ('Dato Sri Wong'), by way of a ministerial motion ('MM'), moved the Dewan to disqualify the respondent from being a member of the House on the ground that the respondent was a person who was disqualified for election to the Dewan for having voluntarily acquired Australian citizenship. The MM was put to a vote and the Dewan voted 70 to 10 in favour of disqualifying the respondent. The Speaker announced that the respondent was disqualified forthwith and ceased to be a member of the Dewan with immediate effect. It was a decision made by the Dewan pursuant to art. 19(1) of the Sarawak Constitution. The respondent thus filed an originating summons ('OS') in the High Court challenging the Dewan's decision to disqualify him as an elected member. The High Court allowed the respondent's OS and held that the disqualification of the respondent (i) as a duly elected member of the Dewan for the State Constituency of N17 Pujut was null and void; (ii) was against the rules of natural justice; and (iii) by the Dewan, was in contravention of the Sarawak Constitution and/or art. 118 of the Federal Constitution ('FC'). Dissatisfied, the appellants appealed to the Court of Appeal and the appeal was dismissed by a majority decision based solely on a jurisdictional point. The majority saw no necessity to delve into the issue of justiciability under art. 72(1) of the FC raised by the appellants save to say that it had no application due to the fact that the Dewan had acted in excess of its power in disqualifying and removing the respondent from the House. Hence the appeals on the following questions of law: (i) whether the Dewan has the power under art. 19(1) of the Sarawak Constitution to make a decision on the continued membership of an elected member whenever a question is raised in the Dewan as to whether that member is qualified for election to the Dewan under art. 17(1)(g) of the Sarawak Constitution; (ii) whether the business or proceedings of the Dewan (including but not limited to the MM) was justiciable, in view of the provisions *inter alia* of under art. 19(1) of the Sarawak Constitution read with art. 72(1) of the FC; (iii) whether upon a proper interpretation of art. 17(1)(g) of the Sarawak Constitution, a disqualification for election to the Dewan, resulting from voluntary acquisition of foreign citizenship and the exercise of rights accorded to a foreign citizen in that foreign country, could be removed and ceased in the

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absence of provision in art. 17(3) or any Article of the Sarawak Constitution for the removal or cessation of such disqualification; (iv) whether there is any conflict between art. 17(1)(g) and under art. 19(1) of the Sarawak Constitution and art. 118 of the FC; (v) whether an election petition pursuant to art. 118 of the FC is the only mode that can be utilised to challenge the appointment or election of a member of the Dewan; (vi) whether a Malaysian citizen, who had acquired a foreign citizenship but renounced it before the nomination of an election, is qualified to be nominated as a candidate for an election in the light of art. 17(1)(g) of the Sarawak Constitution; and (vii) whether the Dewan has the jurisdiction to decide on the disqualification of an elected member who had previously acquired a foreign citizenship though renounced it before the nomination of an election. If the answer was in the affirmative, whether such decision of the Dewan was justiciable under art. 19(1) of the Sarawak Constitution.

**Held (allowing appeals with no order as to costs)**

**Per Abdul Rahman Sebli FCJ delivering the judgment of the court:**

**(1)** When the respondent was appointed to the Dewan, he came with a pre-existing disqualification which he incurred prior to his appointment to the House, which meant that he was already suffering from a disqualification during the currency of his tenure and not only before he was appointed to the Dewan. The operative words in art. 17(1)(g) are 'has voluntarily acquired'. It is a past participle that refers to a past event. Thus, a person who has, in the past, voluntarily acquired foreign citizenship and therefore disqualified for election to the Dewan has no right to remain in the Dewan as an elected member unless his disqualification has been removed or has ceased to have effect. There was no evidence that the respondent's disqualification had been removed or had ceased to have effect when he was appointed to the Dewan. (paras 26 & 27)

**(2)** The word 'member', wherever it appears in the Sarawak Constitution, can only refer to a member who is qualified for election to the Dewan and to no others. There is a difference between a person who is unqualified for election and a person who is disqualified for election. The respondent falls under the second category, having committed an act of disqualification under art. 17(1)(g). It was palpably wrong and goes against the spirit of art. 17(1)(g) to allow such disqualified person to remain in the Dewan. The fact that his election to the Dewan had not been voided by the Election Court did not legitimise his continued presence in the Dewan if otherwise he remained a person who is disqualified for election to the House. (paras 29 & 34)

**(3)** Article 19(1) of the Sarawak Constitution confers on the Dewan the jurisdiction to decide, 'If any question arises', whether the Speaker or a member has ceased to be qualified for appointment or election to the Dewan, and that once a decision is made, the decision is final. The provision is couched in mandatory terms and therefore, the Dewan was merely obeying the mandate of art. 19(1) when it commenced proceedings against the respondent after Dato Sri Wong tabled the MM to disqualify him from being a member of the Dewan. In deciding to vote out the respondent by a majority of 70 to 10, the Dewan was acting within the four corners of its jurisdiction, power and authority and not in excess of its power. (paras 35, 37 & 38)

**(4)** There is no conflict between art. 118 of the FC, which is concerned with the mode of challenging the result of an election, and art. 19(1) of the Sarawak Constitution, which is concerned with the power of the Dewan to disqualify and remove from the House the Speaker or a member who has ceased to be qualified for appointment or election to the House. Article 118 of the FC does not override or supersede art. 19(1) of the Sarawak Constitution. The power of the Election Court is only to declare an election void if there had been a breach of s. 32 of the Election Offences Act 1954 and not to disqualify or to remove the Speaker or any elected member from the House of Parliament or the State Legislatures. Therefore, there was no merit in the respondent's argument that art. 19(1) of the Sarawak Constitution is void for being inconsistent with art. 118 of the FC. (paras 43, 44 & 46)

**(5)** A member 'has ceased to be qualified' within the meaning and contemplation of art. 19(1) of the Sarawak Constitution if his continued presence in the Dewan has become untenable due to his status as a person who is not qualified for election to the Dewan by operation of art. 17(1)(g), regardless of whether he commits the disqualifying act before or after his election to the House. Article 17(1)(g) must be construed to mean that a citizen who has voluntarily acquired foreign citizenship cannot remove the disqualification simply by renouncing that foreign citizenship, as the respondent purported to do in the present case. It is clear that the legislative intent behind art. 17(1)(g) is to disqualify for an indefinite period a person who has voluntarily acquired foreign citizenship. (paras 47, 51 & 67)

**(6)** The respondent, by having acquired the citizenship of Australia, was and still liable to be deprived of his Malaysian citizenship under art. 24(1) of the FC. The deprivation of citizenship is a severe form of action against a citizen for having acquired foreign citizenship and reflected how seriously the FC views the act. The object is to prevent a citizen from acquiring and denouncing his foreign citizenship at will. By voluntarily acquiring Australian citizenship, pledging loyalty to Australia and exercising the rights of an Australian citizen, the respondent's loyalty to Malaysia was questionable, notwithstanding his renunciation of that country's citizenship. The Dewan was therefore justified in disqualifying and removing the respondent from the Dewan as he was unfit to be a member or to continue to be a member of the House. (paras 68, 69 & 72)

**(7)** The question of infringing the doctrine of separation of powers did not arise as the power to decide on the qualification of the respondent as a member of the Dewan resides in the Dewan under art. 19(1) of the Sarawak Constitution and not the court. Article 72(1) of the FC gives immunity to the validity of proceedings in the Dewan from judicial interference. The effect of art. 72(1) of the FC on the decision by the Dewan to disqualify and remove the respondent from the House is that the decision 'shall not be questioned in any court'. The court was therefore barred from questioning the validity of the decision taken by the Dewan under art. 19(1) of the Sarawak Constitution. (paras 75, 76 & 84)

**(8)** The Speaker is not a public servant under the FC and, in any event, the decision to disqualify the respondent was not his decision. It was the collective decision of the Dewan by a majority vote of 70 to 10. More importantly, the decision of the Dewan was not an administrative decision by an administrative body over an administrative officer but an exercise of power by the legislative body over a member of the Dewan under art. 19(1) of the Sarawak Constitution which is shielded from judicial interference by art. 72(1) of the FC. Further, there was nothing wrong or illegal with the Speaker's remarks in the course of the debate on the MM. The Dewan has its own rules and regulations and the Speaker is vested with the power to enforce those rules and regulations to ensure that proceedings in the Dewan are conducted in an orderly manner. The record of appeal showed that the respondent was given every opportunity by the Speaker to defend himself in answer to the MM. In the circumstances, there was no evidential basis for the respondent to complain that he was not given the right of hearing, in breach of the rules of natural justice. (paras 104-108)

**(9)** Leave questions (i) and (vii) were answered in the affirmative and the leave questions (ii) to (vi) were answered in the negative. (para 114)

**Per Tengku Maimun Tuan Mat CJ (dissenting):**

**(1)** Article 48(1)(f) of the FC disqualifies a person on grounds that he or she, *inter alia*, voluntarily acquired foreign citizenship. The provision was substantially mirrored in art. 17(1)(g) of the Sarawak Constitution. In construing the Sarawak Constitution, reference must also be made to the Eighth Schedule and art. 71 of the FC. The Eight Schedule sets out certain provisions which must be inserted into the Constitution of any State. Article 71(4) suggests that the provisions of any State Constitution must have the same wording as the Eighth Schedule or they must be 'substantially to the same effect'. Accordingly, the interpretation of the provisions of arts. 48 and 53 of the FC are instructive as regards the interpretation of the Constitution of any State, in this case, the Sarawak Constitution. (paras 122 & 125)

**(2)** In *Fan Yew Teng v. Setia Usaha, Dewan Ra'ayat & Ors* the crucial and broader point made was that when disqualification happens, doubtful or not, a decision must be made by the appropriate decision-maker. The case was concerned with a post-election disqualification, and therefore, the appropriate decision-maker was the House. By extending the *ratio decidendi*, if a disqualification was a pre-election one, the appropriate body to decide the validity of the election would have to be the Election Court established under art. 118 of the FC. The respondent, by virtue of art. 117(g) of the Sarawak Constitution, was clearly disqualified for election and membership. However, because the disqualification incurred by him was a pre-election disqualification, appropriate body to determine his disqualification was the Election Court and not the Dewan. (paras 132 & 133)

**(3)** The words used in art. 19(1) of the Sarawak Constitution are 'has ceased'. This is similar to art. 53(1) of the FC which uses the phrase 'has become'. Both phrases, be it 'has ceased' or 'has become', in their ordinary meaning, suggest that the disqualification must have happened after the given person is already sitting in the Dewan or the House such that the Dewan or the House may make a decision as to his or her membership. In other words, the qualifier 'has' preceding the verbs 'ceased' or 'become' suggests that the disqualifying factor must be a supervening event. Accordingly, interpreting the words 'has ceased' in art. 19(1) of the Sarawak Constitution suggests that the Dewan has

A powers to make decisions only in respect of post-election disqualifications. This court adopted literal construction and rejected the purposive construction. (paras 136 & 147)

**(4)** The Sarawak Constitution read in its context and in the context of the FC does not support the view that the drafters had intended for the B Dewan to have jurisdiction over pre-election disqualification. The clear and plain language of art. 118 of the FC envisions that only an Election Court has the exclusive jurisdiction to determine pre-election disqualification. There is a clear separation of powers between the Legislature on the one side, to make decisions on post-election C disqualification, and the courts on the other, to make decisions on pre-election disqualification. The indication that the drafters of the Sarawak Constitution had intended to conform with the pre- and post-election structure established by the FC is apparent in art. 20 of the Sarawak Constitution. (paras 141, 144 & 145)

D **(5)** While art. 50(2) renders the election or membership of a person void, that does not mean that such disqualification happens immediately or automatically. Article 50 must be read with art. 53 of the FC. The Sarawak Constitution does not have a provision of similar effect with art. 50(2) of the FC. However, that does not detract or dampen the E general structure of the pre- and post-election dichotomy apparent in the Sarawak Constitution when read in context of its own provisions and the provisions of the FC. On a plain and contextual reading of the Federal and Sarawak Constitutions, the pre- and post-election regime exist mutually exclusive of one another. While the disqualifying factors in F art. 17(1) operate and apply to both pre- and post-election disqualification, the decision-maker in respect of each is respectively the court and the Dewan. (paras 158 & 159)

**(6)** It was the appellants' argument that the present dispute was non-justiciable in light of art. 72(1) of the FC. Upon proper construction of G the relevant State and Federal Constitutional provisions, the Dewan did not have jurisdiction to decide on the respondent's pre-election disqualification. In *Teng Chang Khim v. Badrul Hisham Abdullah & Anor* ('*Teng Chang Khim*'), the Federal Court held that the power of the House to make decisions in respect of disqualification fell within the purview H of art. 72(1) of the FC and as such, was non-justiciable before the courts. The decision was distinguishable as the decision of the Selangor State Legislature in *Teng Chang Khim* had been over a matter which it had jurisdiction. The immunity from judicial interference under art. 72(1) of the FC clearly applied on the facts of *Teng Chang Khim*. In contrast, such

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immunity did not arise in this case because the Dewan had no power to decide on the respondent's pre-election disqualification. Hence, the appeals may be disposed of by answering leave question (vii) in the negative and it was unnecessary to answer the rest of the questions. (paras 161-163 & 165)

**Per David Wong Dak Wah CJ (Sabah & Sarawak) (dissenting):**

**(1)** It is trite that the purposive construction tool can only be used where there is ambiguity in the words appearing in the statute or those words connote more than one meaning. There was no such ambiguity in this case. Reading something that is implied in a document as opposed to purporting to read something into a document are two entirely distinct concepts. A proper and wholesome construction of the Sarawak Constitution against the Federal Constitution clearly suggests that the drafters of the Sarawak Constitution had intended to allow the Dewan the jurisdiction to determine post-election disqualifications only. Thus, one cannot 'read into' the Sarawak Constitution the pre- and post-election mechanism, because such a regime is already implied. Failing to recognise it is thus, in fact, ignoring what the Sarawak Constitution itself provides. (paras 187, 188 & 191)

**(2)** Upon proper construction of the provisions of the FC and Sarawak Constitution, there is clear separation of powers between the High Court and the House or Dewan when it comes to the determination of disqualification. Article 118 of the FC stipulates that no election to the House of Representatives or to the Legislative Assembly of a State shall be called in question except by an election petition presented to the High Court having jurisdiction where the election was held. This accords well with use of the words 'has ceased' in art. 19 to suggest that once a person is already a member, the validity of his membership post-election is to be decided by the Sarawak State Legislature. In this sense, there can be no conflict as there are in fact two different decision-makers each catered to a specific situation, *ie*, pre-election and post-election disqualification. (para 210)

**(3)** There was, in fact, an election petition and the same was dismissed by the election court on a technicality. The grounds and reliefs were similar in nature as the ones sought in the MM which, in substance, called for the removal of the respondent in view of his acquired Australian citizenship. It was of no relevance that the election petition was dismissed due to a technicality. What was relevant was that there was no appeal by the appellants which would simply mean that they accepted the decision of the Election Court and would be disbarred from bringing

this matter before the Dewan by virtue of the concept of *res judicata*. To decide otherwise would mean the appellants could have a second bite of the cherry where a normal litigant would be barred in court to do so. This view was consistent and in consonant with the doctrine of separation of powers. Thus, there was no basis for the raising of the MM as art. 19(1) of the Sarawak Constitution clearly does not confer power on the Sarawak State Legislature to determine pre-election disqualification. (paras 214-217)

**(4)** Although the separation of powers doctrine applies between the Judiciary and the Legislature, this separation is subject to the FC as it is the supreme law of the land. If the respondent had not been given a fair hearing and thus became a victim of a breach of natural justice, there is no impediment to the court intervening as the Legislature is constitutionally bound to adhere to the rule of law. To deprive the respondent of having the requested time to prepare his defence was a breach of natural justice. (para 220)

**(5)** The first part of leave question (vii) was answered in the negative and it was unnecessary to answer the rest of the leave questions. The majority judgment of the Court of Appeal rightly identified the sole issue to be one of jurisdiction and that the right conclusions were arrived at on the correct application of the law. The issue of immunity of the Dewan under art. 72(1) of the FC did not arise because the Dewan, in the first place, did not have jurisdiction to disqualify the respondent. Therefore, the majority decision and judgment of the court below was affirmed, accordingly the appeals were dismissed with no order as to costs. (paras 232 & 233)

***Bahasa Melayu*** *Headnotes*

Responden, warganegara Malaysia yang berasal dari Sarawak, memperoleh kewarganegaraan Australia pada 2010, tetapi telah melepaskannya lima tahun kemudian. Pelepasan kewarganegaraan tersebut diterima oleh Kerajaan Australia berkuat kuasa 4 April 2016. Pada 25 April 2016, responden dicalonkan sebagai calon, bersama-sama dengan tiga lagi, untuk bertanding di Kawasan Negeri N17 Pujut dalam Pilihan Raya Umum Negeri Sarawak. Sebagai sebahagian proses penamaan untuk pilihan raya umum, responden mengikrarkan akuan berkanun menyatakan bahawa dia tidak hilang kelayakan untuk menjadi ahli Dewan, iaitu, dia bukan orang yang hilang kelayakan untuk dipilih ke Dewan. Responden kemudian memenangi pilihan raya itu. Seorang calon yang tewas, Hii King Chiong, memfailkan petisyen pilihan raya terhadap responden memohon deklarasi bahawa responden tidak dipilih dengan sewajarnya atau tidak sepatutnya memenangi pilihan raya atas

alasan dia orang yang 'tidak layak dipilih sebagai ahli Dewan Undangan Negeri' kerana memperoleh kewarganegaraan Australia secara sukarela, bawah per. 17(1)(g) Perlembagaan Negeri Sarawak ('Perlembagaan Sarawak'). Perayu-perayu bukan pihak dalam petisyen pilihan raya. Mahkamah Pilihan Raya membatalkan petisyen tersebut atas alasan teknikal tanpa membicarakan merit petisyen. Hii King Chiong tidak merayu terhadap keputusan tersebut. Kemudian, pada 12 Mei 2017, Dato Sri Wong Soon Koh ('Dato Sri Wong'), melalui usul Menteri ('usul'), memohon pada Dewan untuk pelucutan responden sebagai Ahli Dewan atas alasan responden hilang kelayakan bertanding dalam pilihan raya kerana memperoleh kewarganegaraan Australia secara sukarela. Usul tersebut diundi dan Dewan mengundi 70 ke 10 berpihak pada pelucutan responden. Oleh itu, Speaker mengisytiharkan responden dilucutkan kelayakan dan bukan lagi ahli Dewan berkuat kuasa serta merta. Ini adalah keputusan Dewan menurut per. 19(1) Perlembagaan Sarawak. Oleh itu, responden memfailkan saman pemula ('SP') di Mahkamah Tinggi mencabar keputusan Dewan dalam melucutkan keahliannya. Mahkamah Tinggi membenarkan SP responden dan memutuskan pelucutan keahlian responden (i) sebagai ahli Dewan yang dipilih untuk Kawasan Negeri N17 Pujut adalah terbatal dan tidak sah; (ii) bertentangan dengan kaedah keadilan asasi; dan (iii) oleh Dewan, bertentangan dengan Perlembagaan Sarawak dan atau per. 118 Perlembagaan Persekutuan ('PP'). Tidak berpuas hati, perayu-perayu merayu ke Mahkamah Rayuan dan rayuan tersebut ditolak oleh keputusan majoriti semata-mata atas asas bidang kuasa. Panel majoriti mendapati tiada keperluan untuk mempertimbangkan isu keadilan bawah per. 72(1) PP yang dibangkitkan perayu-perayu kecuali menyatakan bahawa ini tidak terpakai kerana Dewan bertindak melampaui kuasanya dalam melucutkan keahlian dan menyingkir responden dari Dewan. Oleh itu, rayuan-rayuan ini atas soalan-soalan undang-undang berikut: (i) sama ada Dewan mempunyai kuasa bawah per. 19(1) Perlembagaan Sarawak untuk membuat keputusan berkaitan keahlian berterusan ahli yang dipilih apabila soalan dibangkitkan di Dewan sama ada ahli tersebut layak untuk bertanding kerusi Dewan bawah per. 17(1)(g) Perlembagaan Sarawak; (ii) sama ada perjalanan atau prosiding Dewan (termasuk tetapi tidak terhad pada usul) adalah adil, memandangkan peruntukan, antara lain, bawah per. 19(1) Perlembagaan Sarawak dibaca bersama-sama dengan per. 72(1) PP; (iii) sama ada atas tafsiran wajar per. 17(1)(g) Perlembagaan Sarawak, pelucutan daripada bertanding kerusi Dewan akibat pemerolehan kewarganegaraan asing secara sukarela dan pelaksanaan hak-hak yang diberi kepada warganegara asing di negara asing tersebut, boleh disingkirkan dan luput dalam ketiadaan peruntukan dalam per. 17(3) atau mana-mana perkara dalam Perlembagaan Sarawak untuk penyingkiran atau peluputan ketidaklayakan sedemikan;

A (iv) sama ada terdapat apa-apa konflik antara per. 17(1)(g) dan bawah per. 19(1) Perlembagaan Sarawak dan per. 118 PP; (v) sama ada atau tidak petisyen pilihan raya menurut per. 118 PP hanya satu-satunya cara yang boleh digunakan untuk mencabar pelantikan atau pemilihan ahli Dewan; (vi) sama ada warganegara Malaysia yang telah memperoleh kewarganegaraan
B asing tetapi melepaskannya sebelum penamaan dalam pilihan raya, layak dicalonkan sebagai calon pilihan raya berdasarkan per. 17(1)(g) Perlembagaan Sarawak; dan (vii) sama ada Dewan mempunyai bidang kuasa memutuskan pelucutan keahlian ahli yang dipilih yang sebelum itu memperoleh kewarganegaraan asing tetapi telah melepaskannya sebelum
C penamaan pilihan raya. Jika jawapan bersifat afirmatif, sama ada keputusan Dewan adil berdasarkan per. 19(1) Perlembagaan Sarawak.

**Diputuskan (membenarkan rayuan-rayuan tanpa perintah untuk kos) Oleh Abdul Rahman Sebli HMP menyampaikan penghakiman mahkamah:**

D **(1)** Apabila responden dilantik ke Dewan, dia telah sedia mempunyai ketidaklayakan yang diperoleh sebelum pemilihannya ke Dewan, yang bermaksud bahawa dia telah tidak layak semasa tempoh keahliannya dan bukan hanya sebelum dipilih ke Dewan. Perkataan-perkataan yang beroperasi dalam per. 17(1)(g) adalah 'has voluntarily acquired'. Ini
E dalam partisipel lampau yang merujuk pada peristiwa yang telah berlalu. Oleh itu, satu-satu orang yang, sebelum ini, memperoleh secara sukarela, kewarganegaraan asing dan oleh itu, tidak layak untuk bertanding dalam pilihan raya Dewan tiada hak untuk kekal sebagai ahli Dewan yang dipilih kecuali ketidaklayakannya telah disingkir atau tidak
F lagi berkuat kausa. Tiada keterangan bahawa ketidaklayakan responden telah disingkir atau tidak lagi mempunyai kesan apabila dia dilantik ke Dewan.

**(2)** Perkataan 'ahli' setiap kali timbul dalam Perlembagaan Sarawak hanya boleh bermaksud seorang ahli yang layak bertanding kerusi Dewan dan
G bukan maksud lain. Terdapat perbezaan antara orang yang tidak layak bertanding dalam pilihan raya dan orang yang hilang kelayakan bertanding dalam pilihan raya. Responden terangkum dalam kategori kedua, setelah melakukan tindakan yang menjadikannya hilang kelayakan bawah per. 17(1)(g). Ini amat salah dan bertentangan dengan
H niat per. 17(1)(g) untuk membenarkan orang yang hilang kelayakan kekal sebagai ahli Dewan. Fakta bahawa pilihan raya untuk kerusi Dewan tidak dibatalkan oleh Mahkamah Pilihan Raya tidak mensahkan untuk dia terus menjadi ahli Dewan jika sebaliknya dia kekal hilang kelayakan bertanding dalam pemilihan kerusi Dewan.

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**(3)** Perkara 19(1) Perlembagaan Sarawak memberi Dewan bidang kuasa untuk memutuskan, 'Jika apa-apa soalan berbangkit', sama ada Speaker atau ahli hilang kelayakan menduduki atau pemilihan kerusi Dewan, dan sebaik sahaja keputusan dibuat, keputusan itu muktamad. Peruntukan ini dinyatakan dalam bahasa mandatori dan oleh itu, Dewan hanya mematuhi mandat per. 19(1) apabila memulakan prosiding terhadap responden selepas Dato Sri Wong memasukkan usul untuk melucutkan keahlian Dewan responden. Apabila memutuskan pelucutan responden dengan majoriti 70 ke 10, Dewan bertindak dalam lingkungan bidang kuasa, kuasa dan autoriti dan tidak melampaui kuasanya.

**(4)** Tiada konflik antara per. 118 PP, yang berkaitan dengan cara mencabar keputusan pilihan raya, dan per. 19(1) Perlembagaan Sarawak, yang berkaitan dengan kuasa Dewan untuk melucutkan dan menyingkir dari Dewan, Speaker atau ahli yang hilang kelayakan untuk dilantik atau dipilih ke Dewan. Perkara 118 PP tidak mengatasi atau menggantikan per. 19(1) Perlembagaan Sarawak. Kuasa Mahkamah Pilihan Raya hanya untuk mengisytiharkan satu-satu pilihan raya batal jika terdapat pelanggaran s. 32 Akta Kesalahan Pilihan Raya 1954 dan bukan untuk melucutkan atau menyingkir Speaker atau mana-mana ahli yang dipilih daripada Dewan Parlimen atau Dewan Undangan Negeri. Oleh itu, tiada merit dalam hujahan responden bahawa per. 19(1) Perlembagaan Sarawak terbatal kerana tidak konsisten dengan per. 118 PP.

**(5)** Seseorang ahli 'hilang kelayakan' dalam maksud dan bayangan per. 19(1) Perlembagaan Sarawak jika keahliannya dalam Dewan menjadi tidak wajar disebabkan statusnya sebagai seorang yang tidak layak dipilih untuk kerusi Dewan dengan kuat kuasa per. 17(1)(g), tanpa mengira sama ada dia telah melakukan tindakan mengakibatkan kehilangan kelayakan sebelum atau selepas pemilihan ke Dewan. Perkara 17(1)(g) perlu ditafsir untuk membawa maksud bahawa seorang warganegara yang secara sukarela memperoleh kewarganegaraan asing, tidak boleh menghilangkan ketidaklayakan hanya dengan melepaskan kewarganegaraan asing itu, seperti yang dilakukan responden dalam kes ini. Jelas bahawa niat perundangan sebalik per. 17(1)(g) adalah untuk menyingkir, untuk tempoh yang tidak terbatas, seseorang yang memperoleh kewarganegaraan asing.

**(6)** Responden, dengan memperoleh kewarganegaraan Australia, telah dan masih boleh dinafikan kewarganegaraan Malaysia bawah per. 24(1) PP. Penafian kewarganegaraan adalah satu bentuk tindakan serius terhadap warganegara kerana memperoleh kewarganegaraan asing dan menunjukkan PP serius dalam tindakan ini. Tujuannya adalah untuk menghalang warganegara daripada memperoleh dan melepaskan

kewarganegaraan asing sesuka hati. Dengan memperoleh kewarganegaraan Australia secara sukarela, mengikrarkan kesetiaan pada Australia dan melaksanakan hak-hak seorang warganegara Australia, kesetiaan responden pada Malaysia boleh dipersoalkan, walaupun telah melepaskan kewarganegaraan asing itu. Dewan, oleh itu, adil dalam melucutkan keahlian dan menyingkir responden dari Dewan kerana dia tidak layak menjadi ahli atau terus menjadi ahli Dewan.

**(7)** Soalan pelanggaran doktrin pengasingan kuasa tidak timbul kerana kuasa untuk memutuskan kelayakan responden sebagai ahli Dewan terletak pada Dewan bawah per. 19(1) Perlembagaan Sarawak dan bukan mahkamah. Perkara 17(1) PP memberi keimunan pada kesahan prosiding dalam Dewan daripada campur tangan mahkamah. Kesan per. 72(1) PP terhadap keputusan Dewan melucutkan keahlian responden daripada Dewan adalah keputusan tersebut 'tidak boleh dipersoalkan di mana-mana mahkamah'. Oleh itu, mahkamah terhalang daripada mempersoalkan kesahan keputusan yang diambil oleh Dewan bawah per. 19(1) Perlembagaan Sarawak.

**(8)** Speaker bukan pegawai awam bawah PP dan, walau apa pun, keputusan melucutkan keahlian responden bukan keputusan Speaker. Itu adalah keputusan bersama Dewan dengan undi majoriti 70 ke 10. Lebih penting lagi, keputusan Dewan bukan keputusan pentadbiran oleh badan pentadbiran terhadap pegawai pentadbiran tetapi pelaksanaan kuasa oleh badan perundangan terhadap ahli Dewan bawah per. 19(1) Perlembagaan Sarawak yang dilindungi daripada campur tangan kehakiman oleh per. 72(1) PP. Selanjutnya, tiada apa-apa yang salah atau tidak sah dengan kata-kata Speaker semasa perjalanan hujahan untuk usul. Dewan mempunyai kaedah-kaedah dan peraturan-peraturannya sendiri dan Speaker diberi kuasa menguatkuasakan kaedah-kaedah dan peraturan-peraturan tersebut untuk memastikan prosiding di Dewan dijalankan dengan teratur. Rekod rayuan menunjukkan bahawa responden telah diberi peluang oleh Speaker untuk membela dirinya apabila menjawab usul tersebut. Dalam hal keadaan itu, tiada asas keterangan untuk responden mengadu bahawa dia tidak diberi hak didengar, melanggar kaedah-kaedah keadilan asasi.

**(9)** Dalam keadaan itu, soalan-soalan kebenaran (i) dan (vii) dijawab secara afirmatif dan soalan-soalan kebenaran (ii) hingga (vi) dijawab secara negatif.

**Oleh Tengku Maimun Tuan Mat KHN (menentang):**

**(1)** Perkara 48(1)(f) PP memperuntukkan kehilangan kelayakan seseorang atas alasan dia, antara lain, memperoleh dengan sukarela kewarganegaraan asing. Peruntukan itu dicerminkan dengan luas dalam per. 17(1)(g) Perlembagaan Sarawak. Mentafsir Perlembagaan Sarawak, rujukan perlu dibuat pada Jadual Kelapan dan per. 71 PP. Jadual Kelapan menyenaraikan peruntukan-peruntukan tertentu yang mesti dimasukkan dalam Perlembagaan oleh mana-mana Negeri. Perkara 71(4) mencadangkan bahawa peruntukan-peruntukan mana-mana Perlembagaan Negeri mesti mempunyai perkataan yang sama seperti Jadual Kelapan atau mesti 'substantially to the same effect'. Dengan itu, tafsiran peruntukan per. 48 dan 53 PP adalah mengarah berkaitan dengan pentafsiran Perlembagaan mana-mana Negeri, dalam kes ini, Perlembagaan Sarawak.

**(2)** Dalam kes *Fan Yew Teng v. Setia Usaha, Dewan Ra'ayat & Ors* perkara penting dan luas yang dibuat adalah apabila kelucutan kelayakan berlaku, sama ada diragui atau tidak, keputusan mesti dibuat oleh pembuat keputusan yang sewajarnya. Kes itu berkaitan dengan pelucutan kelayakan selepas pilihan raya, dan oleh itu, pembuat keputusan yang betul adalah Dewan. Melanjutkan *ratio decidendi*, jika pelucutan kelayakan adalah sebelum pilihan raya, badan yang sepatutnya memutuskan kesahan pilihan raya tersebut adalah Mahkamah Pilihan Raya yang dibentuk bawah per. 118 PP. Responden, menurut per. 117(g) Perlembagaan Sarawak, jelas hilang kelayakan untuk pilihan raya dan keahlian. Walau bagaimanapun, oleh sebab kehilangan kelayakan yang berlaku padanya adalah kehilangan kelayakan sebelum pilihan raya, badan yang wajar memutuskan kehilangan kelayakannya adalah Mahkamah Pilihan Raya dan bukan Dewan.

**(3)** Perkataan-perkataan yang digunakan dalam per. 19(1) Perlembagaan Sarawak adalah 'has ceased'. Ini serupa dengan per. 53(1) PP yang menggunakan frasa 'has become'. Kedua-dua frasa, sama ada 'has ceased' atau 'has become', dalam maksud biasa, mencadangkan bahawa kehilangan kelayakan sepatutnya telah berlaku selepas orang itu menjadi ahli Dewan dan Dewan boleh membuat keputusan mengenai keahliannya. Dalam perkataan lain, kata penerang 'has' sebelum kata kerja 'ceased' atau 'become' mencadangkan faktor kehilangan kelayakan adalah peristiwa yang sudah berlaku. Dengan itu, mentafsir perkataan-perkataan 'has ceased' dalam per. 19(1) Perlembagaan Sarawak mencadangkan bahawa Dewan hanya mempunyai kuasa membuat keputusan berkaitan kehilangan kelayakan selepas pilihan raya. Mahkamah ini mengguna pakai tafsiran harfiah dan menolak tafsiran bertujuan.

**(4)** Perlembagaan Sarawak dibaca dalam konteksnya dan dalam konteks PP tidak menyokong pendapat bahawa penggubal meniatkan Dewan mempunyai bidang kuasa terhadap kehilangan kelayakan sebelum pilihan raya. Bahasa jelas dalam per. 118 PP membayangkan hanya Mahkamah Pilihan Raya mempunyai bidang kuasa eksklusif untuk menentukan kehilangan kelayakan sebelum pilihan raya. Terdapat pengasingan kuasa jelas antara Perundangan di satu bahagian, untuk membuat keputusan-keputusan berkaitan kehilangan kelayakan selepas pilihan raya, dan mahkamah-mahkamah di satu lagi bahagian, untuk membuat keputusan-keputusan berkaitan kehilangan kelayakan sebelum pilihan raya. Indikasi bahawa penggubal Perlembagaan Sarawak meniatkan untuk mematuhi struktur sebelum dan selepas pilihan raya yang dibentuk oleh PP jelas dalam per. 20 Perlembagaan Sarawak.

**(5)** Apabila per. 50(2) menjadikan pilihan raya atau keahlian seseorang batal, ini tidak bermaksud kehilangan kelayakan sedemikian berlaku serta merta atau secara automatik. Perkara 50 mesti dibaca bersama-sama dengan per. 53 PP. Perlembagaan Sarawak tidak mengandungi peruntukan serupa dengan per. 50(2) PP. Walau bagaimanapun, ini tidak menjejaskan atau melunturkan struktur am pembahagian sebelum dan selepas pilihan raya yang jelas dalam Perlembagaan Sarawak apabila dibaca dalam konteks peruntukannya sendiri dan peruntukan-peruntukan PP. Berdasarkan bacaan jelas dan mengikut konteks PP dan Perlembagaan Sarawak, rejim sebelum dan selepas pilihan raya saling wujud secara eksklusif antara satu sama lain. Walaupun faktor-faktor kehilangan kelayakan dalam per. 17(1) beroperasi dan beraplikasi untuk kedua-dua kehilangan kelayakan sebelum dan selepas pilihan raya, pembuat keputusan berkaitan dalam setiap satu masing-masing adalah mahkamah dan Dewan.

**(6)** Hujahan perayu-perayu adalah bahawa pertikaian ini tidak boleh diadili berdasarkan per. 72(1) PP. Berdasarkan tafsiran wajar peruntukan-peruntukan Perlembagaan Negeri dan Persekutuan yang relevan, Dewan tidak mempunyai bidang kuasa memutuskan kehilangan kelayakan responden sebelum pilihan raya. Dalam *Teng Chang Khim v. Badrul Hisham Abdullah & Anor* ('*Teng Chang Khim*'), Mahkamah Persekutuan memutuskan kuasa Dewan untuk membuat keputusan berkaitan kehilangan kelayakan terangkum dalam ruang lingkup per. 72(1) PP dan oleh itu, tidak boleh diadili di mahkamah. Keputusan itu boleh dibezakan kerana keputusan Dewan Undangan Selangor dalam *Teng Chang Khim* adalah atas perkara yang Dewan mempunyai bidang kuasa. Imuniti daripada campur tangan kehakiman bawah per. 72(1) PP jelas terpakai atas fakta *Teng Chang Khim*. Sebaliknya, imuniti sedemikian tidak timbul dalam kes ini kerana Dewan tiada kuasa memutuskan

kehilangan kelayakan responden sebelum pilihan raya. Oleh itu, rayuan-rayuan ini boleh dilupuskan dengan menjawab soalan kebenaran (vi) secara negatif dan soalan-soalan lain tidak perlu dijawab.

**Oleh David Wong Dak Wah HB (Sabah & Sarawak) (menentang):**

**(1)** Adalah matan bahawa tafsiran bertujuan hanya boleh digunakan apabila ada kesamaran dalam perkataan-perkataan yang wujud dalam statut dan perkataan-perkataan yang membawa lebih satu maksud. Tiada kesamaran sedemikian dalam kes ini. Membaca sesuatu yang tersirat dalam satu dokumen, berbanding membaca sesuatu ke dalam dokumen, adalah dua konsep berbeza sama sekali. Tafsiran wajar dan menyeluruh Perlembagaan Sarawak terhadap PP jelas mencadangkan bahawa penggubal Perlembagaan Sarawak meniatkan untuk membenarkan Dewan bidang kuasa untuk menentukan kehilangan kelayakan selepas pilihan raya sahaja. Oleh itu, seseorang tidak boleh 'membaca ke dalam' Perlembagaan Sarawak, mekanisme sebelum dan selepas pilihan raya, kerana rejim itu sudah sedia tersirat. Kegagalan mengiktirafkannya adalah, pada hakikatnya, tidak mengendahkan apa yang diperuntukkan dalam Perlembagaan Sarawak.

**(2)** Berdasarkan tafsiran wajar peruntukan-peruntukan PP dan Perlembagaan Sarawak, terdapat pengasingan kuasa yang jelas antara Mahkamah Tinggi dan Dewan apabila berkait dengan pemutusan atau kehilangan kelayakan. Perkara 118 PP memperuntukkan bahawa tiada pemilihan ke Dewan Rakyat atau Dewan Undangan Negeri boleh dipersoalkan kecuali melalui petisyen pilihan raya yang dikemukakan ke Mahkamah Tinggi yang mempunyai bidang kuasa di mana pilihan raya diadakan. Ini sejajar dengan penggunaan perkataan-perkataan 'has ceased' dalam per. 19 untuk mencadangkan bahawa sebaik sahaja satu-satu orang menjadi ahli, kesahan keahliannya selepas pilihan raya akan diputuskan oleh Dewan Undangan Negeri Sarawak. Dalam hal ini, tidak mungkin wujud konflik kerana sebenarnya, terdapat dua pembuat keputusan, masing-masing ditujukan untuk situasi tertentu, iaitu, kehilangan kelayakan sebelum pilihan raya dan selepas pilihan raya.

**(3)** Sebenarnya terdapat petisyen pilihan raya dan ini ditolak oleh Mahkamah Pilihan Raya atas alasan teknikal. Alasan-alasan dan relief-relief tersebut bersifat serupa seperti yang dipohon dalam usul yang, secara inti patinya, memohon pelucutan responden berdasarkan kewarganegaraan Australia yang diperoleh. Tidak relevan bahawa petisyen pilihan raya telah ditolak disebabkan alasan teknikal. Apa yang relevan ialah tiada rayuan oleh perayu-perayu yang bermaksud bahawa

mereka menerima keputusan Mahkamah Pilihan Raya dan akan dihalang daripada membawa perkara ini ke Dewan menurut konsep *res judicata*. Memutuskan sebaliknya akan bermaksud perayu-perayu akan mempunyai peluang kedua apabila litigan biasa akan dihalang mahkamah untuk berbuat demikian. Pandangan ini konsisten dan sejajar dengan doktrin pengasingan kuasa. Oleh itu, tiada asas untuk membangkitkan usul kerana per. 19(1) Perlembagaan Sarawak jelas tidak memberi kuasa pada Dewan menentukan kehilangan kelayakan sebelum pilihan raya.

**(4)** Walaupun doktrin pengasingan kuasa beraplikasi antara Badan Kehakiman dan Perundangan, pengasingan kuasa ini tertakluk pada PP kerana ini adalah undang-undang utama negara. Jika responden tidak diberi perbicaraan adil dan oleh itu menjadi mangsa pelanggaran keadilan asasi, tiada halangan untuk mahkamah campur tangan kerana Perundang terikat secara perlembagaan untuk mematuhi kedaulatan undang-undang. Menafikan responden daripada mendapat masa yang dipohon untuk menyediakan pembelaan adalah pelanggaran keadilan asasi.

**(5)** Bahagian pertama soalan kebenaran (vii) dijawab secara negatif dan tiada keperluan menjawab soalan-soalan lain. Penghakiman majoriti Mahkamah Rayuan dengan betul mengenal pasti satu-satunya isu adalah berkaitan bidang kuasa dan kesimpulan betul dibuat mengguna pakai undang-undang yang betul. Isu keimunan Dewan bawah per. 72(1) PP tidak timbul kerana Dewan, pertama sekali, tidak mempunyai bidang kuasa melucutkan keahlian responden. Oleh itu, keputusan majoriti dan penghakiman mahkamah di bawah disahkan, dengan itu, rayuan-rayuan ini ditolak tanpa perintah untuk kos.

**Case(s) referred to:**

*Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC* ***(refd)***

*Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd [2004] 1 CLJ 701 FC* ***(refd)***

*Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus [1984] 1 CLJ 28; [1984] 1 CLJ (Rep) 98 FC* ***(refd)***

*Dewan Undangan Negeri Selangor & Ors v. Mohd Hafarizam Harun [2016] 7 CLJ 143 FC* ***(refd)***

*Election Commission, India v. Saka Venkata Subba Rao [1953] AIR 210; [1953] SCR 1144* ***(refd)***

*Election Commission, Malaysia v. Abdul Fatah Haron [1987] 2 CLJ 193; [1987] CLJ (Rep) 92 SC* ***(refd)***

*Fan Yew Teng v. Government of Malaysia [1976] 1 LNS 28 HC* ***(refd)***

*Fan Yew Teng v. Setia Usaha, Dewan Ra'ayat & Ors [1975] 1 LNS 39 HC* ***(refd)***

*Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals [2018] 3 CLJ 145 FC* ***(refd)***

*James v. The Commonwealth of Australia [1936] AC 578* ***(refd)***
*Ketua Pengarah Kastam v. Ho Kwan Seng [1975] 1 LNS 72 FC* ***(refd)***
*Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC* ***(refd)***
*Lim Cho Hock v. Speaker, Perak State Legislative Assembly [1979] 1 LNS 45 HC* ***(refd)***
*Loh Kooi Choon v. Government Of Malaysia [1975] 1 LNS 90 FC* ***(refd)***
*Merdeka University Bhd v. Government Of Malaysia [1981] CLJ 175; [1981] CLJ (Rep) 191 HC* ***(refd)***
*NP Ponnuswami v. Returning Officer, Namakkal Constituency & Ors (1952) 3 SCR 218* ***(refd)***
*Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC* ***(refd)***
*Penguasa, Tempat Tahanan Perlindungan Kamunting, Taiping & Ors v. Badrul Zaman PS Md Zakariah [2018] 8 CLJ 273 FC* ***(refd)***
*PP v. Kok Wah Kuan [2007] 6 CLJ 341 FC* ***(refd)***
*PP v. Rajappan Chinna Kounder [1986] 1 CLJ 175; [1986] CLJ (Rep) 217 SC* ***(refd)***
*R v. Chaytor [2011] 1 AC 684* ***(refd)***
*Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case [2017] 5 CLJ 526 FC* ***(refd)***
*Teng Chang Khim v. Badrul Hisham Abdullah & Anor [2017] 9 CLJ 630 FC* ***(refd)***
*Teng Chang Khim & Ors v. Dato' Raja Ideris Raja Ahmad & Ors [2014] 3 CLJ 173 FC* ***(refd)***
*Yang Dipertua, Dewan Rakyat & Ors v. Gobind Singh Deo [2014] 9 CLJ 577 FC* ***(refd)***

**Legislation referred to:**
Constitution of the State of Sarawak (Sarawak), arts. 16, 17(1)(g), (3), (4), (5), 18(2)(a), 19(1), 20
Election Offences Act 1954, s. 32(e)
Federal Constitution, arts. 4(1), 24(1), 48(1)(e), (f), 50(1), 50(2), 53(1), 71(4), 72(1), 118, 133, 135(2), Eighth Schedule

The Constitution of India [Ind], arts. 190(3), 191(1)(d), (2), 192(1), 193, 329

**Other source(s) referred to:**
*Bindra's Interpretation of Statutes,* 7th edn, pp 947-948
*Parliamentary Privilege and its Practice in Malaysia: An Overview,* [2012] 2 MLJ c-cxviii

*(Civil Appeal No: 01(f)-20-08-2019(Q))*
*For the appellant - Cecil Abraham, Shankar Ram Asnani, Rishwant Singh & Russel Lim; M/s Thomas, Shankar Ram & Co Advocs*
*For the 1st respondent - Chong Siew Chiang, Wong King Wei & Michael Kong Feng Nian; Messrs King Wei and Company*
*For the 2nd respondent - George Lo & Jonathan Tay; M/s George Lo & Partners Advocs*
*For the 3rd respondent - Talat Mahmood Abdul Rashid, SAG, Sarawak, Saferi Ali, Mohd Adzrul Adzlan & Evy Liana Atang; SLO, Sarawak*
*For the 4th respondent - Shamsul Bolhassan & Azizan Md Arshad; SFCs*

*(Civil Appeal No: 01(f)-21-08-2019(Q)*
*For the appellant - Talat Mahmood Abdul Rashid; SAG, Sarawak, Saferi Ali, Mohd Adzrul Adzlan & Evy Liana Atang; SLO, Sarawak*

A *[Editor's note: For the Court of Appeal judgment, please see The Speaker Of Dewan Undangan Negeri Of Sarawak "Datuk Amar Mohamad Asfia Awang Nassar" v. Ting Tiong Choon & Ors And Other Appeals [2019] 2 CLJ 289 (overruled).]*

*Reported by S Barathi*

B

## JUDGMENT

**Abdul Rahman Sebli FCJ:**

**[1]** There were three appeals before us and all three concerned the power of the Dewan Undangan Negeri of Sarawak ("the Dewan") to disqualify a
C member for having voluntarily acquired foreign citizenship prior to his election to the House. The first appeal was by the Speaker of the Dewan, Datuk Amar Mohamad Asfia Awang Nassar, the second by the Dewan itself and the third by Dato Sri Wong Soon Koh, a Minister in the State Cabinet at the material time.

D **[2]** The facts are simple and straightforward. The respondent, Ting Tiong Choon is a Malaysian citizen of Sarawak origin. He graduated with MBBS medical degree in 1992 from the University of New South Wales, Australia. On 20th January 2010, he acquired the citizenship of Australia but renounced it five years later in 2015. His renunciation was accepted by the
E Australian Government with effect from 4 April 2016. 21 days later, ie on 25 April 2016, the respondent was nominated as a candidate together with three others to contest the state constituency of N17 Pujut in the Sarawak State General Election.

F **[3]** As part of the nomination process for the general election, the respondent affirmed a statutory declaration (Borang 5A) on 22 April 2016 to the effect that he had not lost his eligibility to be a member of the Dewan, meaning to say he was not a person who was disqualified for election to the House. On 7 May 2016, he was returned as the winner by polling 8,899 votes, giving him a majority of 1,759 votes.

G **[4]** On 16 June 2016, a defeated candidate, one Hii King Chiong, filed an election petition against the respondent seeking a declaration that the respondent was not duly elected or ought not to have been returned on the ground that he was a person who was "disqualified for being elected as an elected member of the Dewan Undangan Negeri" for having voluntarily
H acquired Australian citizenship. This ground falls under art. 17(1)(g) of the Constitution of the State of Sarawak ("the Sarawak Constitution"), which reads:

I

17. (1) Subject to the provisions of this Article, a person is disqualified for being elected as an elected member of the Dewan Undangan Negeri if:

(g) he has voluntarily acquired citizenship of or exercised rights of citizenship in, any country outside the Federation or has made a declaration of allegiance to any country outside the Federation.

**[5]** The equivalent provision in the Federal Constitution is art. 48(1)(f) which reads:

48. (1) Subject to the provisions of this Article, a person is disqualified for being a member of either House of Parliament if:

(f) he has voluntarily acquired citizenship of, or exercised rights of citizenship in, any country outside the Federation or has made a declaration of allegiance to any country outside the Federation.

**[6]** The appellants were not parties to the election petition filed by Hii King Chiong. On 14 October 2016, the election court struck out the petition on a technical ground without hearing the merits of the petition and awarded costs of RM100,000 to the respondent payable jointly and severally by the first and second appellants (the first and second defendants at the election court). Hii King Chiong did not appeal against the decision.

**[7]** On 4 May 2017, the Royal Malaysian Police through its director of criminal investigation informed Dato Sri Wong Soon Koh by letter that the respondent had renounced his Australian citizenship with effect from 4 April 2016 but were unable at that juncture to ascertain whether the respondent had exercised the right of citizenship of another country or had made any declaration of allegiance to any country outside Malaysia.

**[8]** On the morning of 12 May 2017, Dato Sri Wong Soon Koh by way of a ministerial motion dated 12 May 2017 moved the Dewan to disqualify the respondent from being a member of the House on the same ground that the petitioner Hii King Chiong relied on in his election petition against the respondent, ie, that the respondent was a person who was disqualified for election to the Dewan for having voluntarily acquired Australian citizenship.

**[9]** The ministerial motion was put to a vote and the Dewan voted 70 to 10 in favour of disqualifying the respondent. Thereupon the Speaker announced that the respondent was disqualified forthwith and ceased to be a member of the Dewan with immediate effect. It was a decision that was made by the Dewan pursuant to art. 19(1) of the Sarawak Constitution, which provides as follows:

19. (1) If any question arises whether the Speaker or a member of the Dewan Undangan Negeri has ceased to be qualified for appointment or election as such, the decision of the Dewan shall be taken and shall be final:

A Provided that this Article shall not be taken to prevent the practice of the Dewan postponing a decision in order to allow for the taking or determination of any proceedings that may affect the decision (including proceedings for the removal of the disqualification).

B **[10]** On 7 June 2017, the respondent filed an originating summons in the High Court at Kuching to challenge the Dewan's decision to disqualify him as an elected member. He succeeded. On 17 June 2017, the Kuching High Court allowed the respondent's originating summons and held as follows:

(i) that the disqualification of the respondent as a duly elected member of
C the Dewan for the State Constituency of N17 Pujut was null and void;

(ii) that the disqualification of the respondent was against the rules of natural justice;

(iii) that the disqualification of the respondent by the Dewan was in
D contravention of the Sarawak Constitution and/or art. 118 of the Federal Constitution.

**[11]** Dissatisfied with the decision, the appellants appealed to the Court of Appeal. Their appeals were heard on 26 October 2017 and dismissed on 13 July 2018 by a majority decision, hence the present appeals before us.

E **[12]** In essence, the majority comprising Abang Iskandar Abang Hashim JCA (as His Lordship then was) and Harmindar Singh Dhaliwal JCA held as follows:

(i) the respondent was a disqualified person by operation of art. 17(1)(g)
F of the Sarawak Constitution;

(ii) article 17(1)(g) of the Sarawak Constitution is applicable to a person who suffers disqualification prior to an election as well as to an elected member of the Dewan, that is to say post-election;

(iii) article 19(1) of the Sarawak Constitution only concerns supervening
G disqualification, that is to say disqualification that was incurred by a member after he was elected to the Dewan;

(iv) Because art. 19(1) of the Sarawak Constitution only applies to supervening disqualification, the Dewan had no power, authority and
H jurisdiction to decide on disqualification under art. 17(1)(g) of the Sarawak Constitution where a person incurs the disqualification before his election to the Dewan;

(v) The Dewan only has power, authority and jurisdiction to decide on disqualification under art. 19(1) of the Sarawak Constitution when a
I member incurs the disqualification after his election to the Dewan;

(vi) For pre-election disqualification under art. 17(1)(g) of the Sarawak Constitution, the issue can only be dealt with by the election judge pursuant to art. 118 of the Federal Constitution read with s. 32(e) of the Election Offences Act 1954;

(vii) The ministerial motion dated 12 May 2017 had gone to aver that the respondent had ceased to be a member of the Dewan which was within the province of art. 18(2)(a) of the Sarawak Constitution which is a post-election disqualification, meaning the respondent had incurred the disqualification after he was elected to the Dewan when, in fact, the respondent was a member of the Dewan with a pre-election disqualification; and

(viii) The matter of privilege or immunity under art. 72 of the Federal Constitution could not apply to the Dewan in passing the ministerial motion on 12 May 2017 as the Dewan did not act within its power as conferred on it by the Sarawak Constitution in removing the respondent as a member of the Dewan.

**[13]** It is clear from the grounds that the majority decision was based solely on a jurisdictional point. Given their view on jurisdiction, the majority saw no necessity to delve into the issue of justiciability under art. 72(1) of the Federal Constitution raised by the appellants save to say that it had no application due to the fact that the Dewan had acted in excess of its power in disqualifying and removing the respondent from the House. As for the issue of breach of the rules of natural justice raised by the respondent, the majority decided not to deal with the matter altogether.

**[14]** Mary Lim Thiam Suan JCA who gave a dissenting judgment proffered, in essence, the following reasons for her decision:

(i) articles 17(3), (4) and (5) of the Sarawak Constitution do not provide for the removal of or the taking into effect of the disqualification specified under art. 17(1)(g) of the Sarawak Constitution which deals with a person voluntarily acquiring citizenship outside Malaysia or has made a declaration of allegiance to any country outside Malaysia;

(ii) the Dewan cannot have as its members, persons who have voluntarily acquired or exercised rights of citizenship in or to any country except Malaysia. When a Malaysian citizen chooses to be a member of the Dewan, the disqualification conditions in art. 17(1)(g) of the Sarawak Constitution are unequivocal and uncompromising in that, where a Malaysian citizen has committed or done any of the acts mentioned in art. 17(1)(g) of the Sarawak Constitution, such member is disqualified;

(iii) the effect of the Sarawak Constitution, including art. 19(1), was that the Dewan is vested with the jurisdiction to decide on the disqualification of the respondent;

(iv) article 118 of the Federal Constitution deals with the challenge against an election result by way of a petition and it does not make any reference to challenge of disqualification of members of the Dewan;

(v) the ministerial motion tabled by the appellant does not question the outcome of the election but it questions the qualification of the respondent as a member of the Dewan, whether the respondent had met the terms in art. 16 read with art. 17(1)(g) and whether the respondent had ceased to qualify. Under art. 19(1), a decision on the qualification of membership may be taken by the Dewan itself by its own members;

(vi) the Dewan has power and jurisdiction to deal with the question of qualification;

(vii) by virtue of art. 19(1) of the Sarawak Constitution, the decision of the Dewan is non-justiciable;

(viii) in matters properly within the internal management and competence of the Dewan, the Dewan is entitled to the protection of parliamentary privilege as provided by art. 72(1) of the Federal Constitution and the protection of art. 19(1) of the Sarawak Constitution;

(ix) the right to sit in and be a member of the Dewan is part and parcel of parliamentary privilege and such privilege is not respected by arguing that the court has no jurisdiction to examine such privilege;

(x) the court should respect such privilege and not interfere in any parliamentary proceedings, internal management or core essential business of the Dewan where such interference will impact adversely on the core or essential business of the Dewan; and

(xi) there is no provision in either the Sarawak Constitution or the Federal Constitution to suggest that the power to decide on the question of disqualification is given to any other person or entity, including the election court.

**[15]** Of significance to note is that both the majority and the minority ruled that the respondent was a disqualified person by operation of art. 17(1)(g) of the Sarawak Constitution and that the disqualification was not removable, not redeemable and not forgivable. Effectively this means that the respondent's pre-election disqualification, being not removable, not

redeemable and unforgivable, was carried over to his appointment as a member of the Dewan. Abang Iskandar Abang Hashim JCA writing for the majority made this clear in para. [29] of his judgment:

> [29] It is one of the key arguments advanced by the defendants that the disqualification with which the plaintiff was concerned had centred on art. 17(1)(g) of the Sarawak Constitution, namely for having voluntarily acquired a foreign citizenship of country outside of the Federation of Malaysia, *to wit*, the Australian citizenship. According to the Defendants, this disqualification under art. 17(1)(g) is a disqualification of such a nature which is not removable or redeemable, unlike other disqualifications listed under art. 17(1). Paragraph (3) to art. 17 was referred to and it was submitted to us that para. (3) did not forgive a person similarly circumstanced as the plaintiff. In the context of para. (3) a foreigner who becomes a Malaysian citizen is not disqualified despite what he did before he becomes a Malaysian citizen. With respect I agree with the defendant's contention on this issue ... in that the plaintiff was a disqualified person by operation of para. (1)(g) of art. 17 of the Sarawak State Constitution. Clearly the plaintiff was not a person envisaged by art. 17(3) who could find solace in its benevolent embrace.

**[16]** At para. [99], the learned judge emphatically drove home the point:

> [99] In sum, I agree with the Defendants that the plaintiff had committed a disqualifying act as a person, under art. 17(1)(g) of the Sarawak Constitution. I agree too, that such an act incurred under the said provisions as contained in art. 17(1)(a) is one that cannot be forgiven, not even under art. 17(3) of the said Sarawak State Constitution.

**[17]** What appears from a reading of these two paragraphs is that the learned judge placed particular importance on the difference between the respondent's capacity as a "person" before the election and his capacity as a "member" of the Dewan after his election. The imputation is that since the respondent as a "person" was not a "member" of the Dewan when he committed the act of disqualification under art. 17(1)(g) of the Sarawak Constitution, he was not subject to the jurisdiction of the Dewan under art. 19(1).

**[18]** It is pertinent to note in this regard that all three judges of the Court of Appeal had ruled that the respondent's disqualification under art. 17(1)(g) was continuing and unforgivable. This ruling was clearly adverse to the respondent, yet he did not appeal or cross-appeal against the decision. The present appeals must therefore be decided on the premise that the respondent was a disqualified person both before and after his election to the Dewan and that the disqualification was a continuing disqualification for the purposes of art. 17(1)(g) and art. 19(1) of the Sarawak Constitution.

**[19]** It was not permissible for the respondent to mount a collateral attack on the ruling in the appeals before us as it was not a ruling that was null and void and of no effect that could be assailed and set aside without the need to file an appeal: See *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75.

**[20]** There were seven leave questions of law for our determination, as set out below:

(i) Whether the Dewan has the power under art. 19(1) of the Sarawak Constitution to make a decision on the continued membership of an elected member whenever a question is raised in the Dewan as to whether that member is qualified for election to the Dewan under art. 17(1)(g) of the Sarawak Constitution;

(ii) Whether the business or proceedings of the Dewan (including but not limited to the ministerial motion on 12 May 2017) is justiciable, in view of the provisions *inter alia* of art. 19(1) of the Sarawak Constitution read with art. 72(1) of the Federal Constitution;

(iii) Whether upon a proper interpretation of art. 17(1)(g) of the Sarawak Constitution, a disqualification for election to the Dewan resulting from voluntary acquisition of foreign citizenship and the exercise of rights accorded to a foreign citizen in that foreign country, could be removed and ceased in the absence of provision in art. 17(3) or any article of the Sarawak Constitution for the removal or cessation of such disqualification;

(iv) Whether there is any conflict between art. 17(1)(g) and art. 19(1) of the Sarawak Constitution and art. 118 of the Federal Constitution;

(v) Whether or not an election petition pursuant to art. 118 of the Federal Constitution is the only mode that can be utilised to challenge the appointment or election of a member of the Dewan;

(vi) Whether a Malaysian citizen who had acquired a foreign citizenship but renounced it before the nomination of an election is qualified to be nominated as a candidate for an election in light of art. 17(1)(g) of the Sarawak Constitution; and

(vii) Whether the Dewan has the jurisdiction to decide on the disqualification of an elected member who had previously acquired a foreign citizenship though renounced it before the nomination of an election. If the answer is in the affirmative, whether such decision of the Dewan is justiciable in light of art. 19 of the Sarawak Constitution.

**[21]** Questions (i), (ii), (iv), (v), (vi) and (vii) are inter-related. They relate one way or another to the issue of jurisdiction. I shall begin with this poser: Can a person who is disqualified for election to the Dewan continue to sit in the Dewan as an elected member? The majority, while agreeing that the respondent was a disqualified person by operation of art. 17(1)(g) of the Sarawak Constitution, nevertheless answered the question in the affirmative for the reason that art. 19(1) does not clothe the Dewan with the jurisdiction to disqualify and remove the respondent from the House.

**[22]** The factual foundation on which the majority came to the conclusion was that the disqualifying act of acquiring Australian citizenship by the respondent was committed before he was elected as a member of the Dewan and not during the currency of his tenure. What the majority did was to draw a demarcation line between pre-election disqualification and post-election disqualification. This ties with the importance placed by the majority on the difference between the respondent's capacity as a "person" before the election and his capacity as a "member" of the Dewan after the election.

**[23]** The rationale that underpins the reasoning of the majority is encapsulated in the following pronouncement by Abang Iskandar Abang Hashim JCA in para. [93] of his grounds of judgment:

> To go backwards in time and then consider an incidence of disqualification prior to the election would amount to a determination of the disqualification of a **person**, as opposed to that of a **member**. With respect, in fact, to go back in time and deal with a disqualification that was incurred long before a person got elected as a member would amount to an overreach by the Dewan which, in my view can find no constitutional support or justification within the context of the Sarawak State Constitution.
>
> (emphasis added)

**[24]** The ramification of the decision is that a "person" who is not even qualified for election to the Dewan but who somehow manages to get appointed to the Dewan can remain in the Dewan as an elected "member" at his pleasure and there is absolutely nothing the Dewan can do to remove him from the House. It's a *fait accompli*.

**[25]** That could not have been what the framers of the Sarawak Constitution intended when formulating art. 19(1). With the greatest of respect to the majority, such construction of art. 19(1) must be rejected as it leads to an absolute absurdity. A scenario that comes to mind is a situation where debates in the Dewan to chart the future direction of Sarawak are articulated by persons who are not even eligible to stand for election to the august House. That will be quite a spectre to behold.

**[26]** The flaw in the majority's reasoning is that it failed to take into account the fact that the respondent was a disqualified person both before and after his appointment to the Dewan. When he was appointed to the Dewan, the respondent came with a pre-existing disqualification which he incurred prior to his appointment to the House, which means he was already suffering from a disqualification during the currency of his tenure and not only before he was appointed to the Dewan. It was therefore fundamentally wrong for the majority to presuppose that the respondent was only suffering from pre-election disqualification and not post-election disqualification.

**[27]** The operative words in art. 17(1)(g) are "has voluntarily acquired". It is a past participle that refers to a past event. Thus, a person who has in the past voluntarily acquired foreign citizenship and therefore disqualified for election to the Dewan has no right to remain in the Dewan as an elected member unless his disqualification has been removed or has ceased to have effect. There is no evidence that the respondent's disqualification had been removed or had ceased to have effect when he was appointed to the Dewan.

**[28]** The language of art. 17(1)(g) of the Sarawak Constitution is plain and unambiguous. There is only one meaning to be ascribed to the provision, and that is, a person who is otherwise eligible for election to the Dewan but who has since become disqualified for having committed an act of disqualification under the art. 17(1)(g), loses his eligibility to stand for election to the House.

**[29]** By parity of reasoning, if such person has lost his eligibility to stand for election to the Dewan, a *fortiori* he must have lost his eligibility to be appointed to the Dewan as an elected member. It is palpably wrong and goes against the spirit of art. 17(1)(g) to allow such disqualified person to remain in the Dewan. That will defeat the whole purpose of going through the election process, which is to appoint only qualified persons to the House as elected members. The fact that his election to the Dewan has not been voided by the election court does not legitimise his continued presence in the Dewan if otherwise he remains a person who is disqualified for election to the House.

**[30]** The object behind art. 17(1)(g) read with art. 19(1) of the Sarawak Constitution is clear, which is to prevent a disqualified person from getting his way into the Dewan and to remain in the House as an elected member. It will be a strange working of the law if a disqualified person can legitimately sit in the House as an elected member and enjoy all the privileges accorded to a member. That will render art. 17(1)(g) and art. 19(1) completely otiose and denuded of all meaning, thus giving the wrong impression that they were enacted without any purpose in mind, contrary to

an established principle of statutory interpretation that the Legislature does not legislate in vain. Article 19(1) must be read harmoniously with art. 17(1)(g) and not in isolation.

**[31]** In *James v. The Commonwealth of Australia* [1936] AC 578 at 613, Lord Wright *inter alia* said:

> The question, then, is one of construction, and in the ultimate resort must be determined upon the actual words used, read not *in vacuo* but as occurring in a single complex instrument, in which one part may throw light on another. The Constitution has been described as the federal compact, and the construction must hold a balance between all its parts.

**[32]** This court in *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd* [2004] 1 CLJ 701; [2004] 2 MLJ 257 took a similar approach where Augustine Paul JCA (as he then was) delivering the judgment of the court adopted the following rule of constitutional construction expounded by the learned authors of *Bindra's Interpretation of Statutes* 7th edn, at pp. 947-948:

> The Constitution must be considered as a whole, and so as to give effect, as far as possible, to all its provisions. It is an established canon of constitutional construction that no one provision of the Constitution is to be separated from all the others, and considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purpose of the instrument (*Old Wayne etc Association v. McDonough SI L ed 345*; *Doconers v. Bidwell* 82 (US) 244:45 L ed 1088; *Myers v. United States* 272 US 52:71 L ed 60, 180). An elementary rule of construction is, if possible, effect should be given to every part and every word of a Constitution and that unless there is some clear reason to the contrary, no portion of the fundamental law should be treated as superfluous (*Williams v. United States* 289 US 553:77 L ed 1372; *Marbury v. Madison I Cranch* (US) 137:2 L ed 60; *Myers v. United States* 272 US 52:71 L ed 60; *United States v. Buffer* 297 U SI:80 L ed 477).

**[33]** In *Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus* [1984] 1 CLJ 28; [1984] 1 CLJ (Rep) 98; [1981] 1 MLJ 29, Raja Azlan Shah Ag LP (as His late Royal Highness then was) made the following pertinent observations on the proper way to interpret a constitution:

> In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way "with less rigidity and more generosity than other statutes" (see *Minister of Home Affairs v. Fisher*). A constitution is *sui generis*, calling for its own principles of interpretation, suitable to its character, but

A without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case: "A Constitution is a legal instrument given rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have been given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving recognition and effect to those fundamental rights and freedoms." The principle of interpreting Constitutions "with less rigidity and more generosity" was again applied by the Privy Council in *Attorney General of St Christopher, Nevis and Anguilla v. Reynolds*.

**[34]** The word "member" wherever it appears in the Sarawak Constitution can only refer to a member who is qualified for election to the Dewan and to no others. There is a difference between a person who is unqualified for election and a person who is disqualified for election. The respondent falls under the second category, having committed an act of disqualification under art. 17(1)(g).

**[35]** As for the issue of jurisdiction, there can be no argument that art. 19(1) of the Sarawak Constitution confers on the Dewan the jurisdiction to decide, "If any question arises", whether the Speaker or a member (of which the respondent is one) has ceased to be qualified for appointment or election to the Dewan, and that once a decision is made, the decision is final.

**[36]** In the present case, the question had, as a matter of law, arisen in the Dewan whether the respondent, by reason of his disqualification under art. 17(1)(g) of the Sarawak Constitution, had "ceased to be qualified", meaning to say no longer fit to remain as an elected member of the Dewan.

**[37]** It is to be noted that art. 19(1) imposes on the Dewan the duty to take the decision whenever a question of the qualification of the Speaker or a member "arises", which means the Dewan has no discretion in the matter but to take the decision. The provision is couched in mandatory terms ("the decision of the Dewan shall be taken"). Therefore, the Dewan was merely obeying the mandate of art. 19(1) when it commenced proceedings against the respondent after Dato Sri Wong Soon Koh tabled the ministerial motion to disqualify him from being a member of the Dewan. The respondent cannot be heard to say that he does not come under the purview of art. 19(1), unless he admits that he is not a member of the House.

**[38]** It is clear that the Dewan was acting within the four corners of its jurisdiction, power and authority when it decided to vote out the respondent by a majority of 70 to 10. The Dewan did not act in excess of its power, contrary to the submission of learned counsel for the respondent and the finding of the majority.

**[39]** The respondent however argued, which argument was embraced by the High Court and the majority of the Court of Appeal, that since the respondent's disqualification was a pre-election disqualification and not a post-election disqualification, only the election court had the jurisdiction to decide on the respondent's qualification as an elected member of the Dewan, citing art. 118 of the Federal Constitution read with s. 32(e) of the Election Offences Act 1954 ("the Election Offences Act"). The two provisions are reproduced below:

> Article 118 of the Federal Constitution
>
> No election to the House of Representatives or to the Legislative Assembly of a State shall be called in question except by an election petition presented to the High Court having jurisdiction where the election was held.
>
> Section 32(e) of the Election Offences Act
>
> The election of a candidate at any election shall be declared to be void on an election petition on any of the following grounds only which may be proved to the satisfaction of the Election Judge:
>
> (e) that the candidate was at the time of his election a person disqualified for election.

**[40]** Reliance was placed by learned counsel for the respondent on the then Supreme Court case of *Election Commission, Malaysia v. Abdul Fatah Haron* [1987] 2 CLJ 193; [1987] CLJ (Rep) 92 and the Indian Supreme Court case of *NP Ponnuswami v. Returning Officer, Namakkal Constituency & Ors* (1952) 3 SCR 218 for the proposition that art. 118 of the Federal Constitution has the effect of ousting the jurisdiction of the Dewan and indeed of all courts other than the election court.

**[41]** The first thing to note with regard to art. 118 of the Federal Constitution is that it does not confer jurisdiction on the election court. Even if art. 118 is not there in the Federal Constitution, the election court is still vested with jurisdiction to hear election petitions. What art. 118 does is to prescribe the mode for challenging an election result, which must be done by way of an election petition and by no other mode.

**[42]** By way of comparison, art. 19(1) of the Sarawak Constitution is not concerned with challenging the result of an election, which has come to pass and the winning candidate has duly been appointed to the Dewan as an elected member. Rather, it is a provision that empowers the Dewan to decide, "If the question arises", on the qualification of the Speaker or a member to continue to remain in the Dewan after his appointment to the House.

**[43]** Thus, the difference between the two constitutional provisions is that while art. 118 of the Federal Constitution is concerned with the mode of challenging the result of an election, art. 19(1) of the Sarawak Constitution is concerned with the power of the Dewan to disqualify and remove from the House the Speaker or a member who has ceased to be qualified for appointment or election to the House. This process has nothing to do with challenging the result of an election. Indeed, the ministerial motion tabled by Dato Sri Wong Soon Koh was not to question the outcome of the election result but to decide on the respondent's right to remain in the Dewan as an elected member of the House.

**[44]** It is important to appreciate that it is not within the power of the election court to disqualify or to remove the Speaker or any elected member from the House of Parliament or the State Legislatures. Its power is only to declare an election void if there had been a breach of s. 32 of the Election Offences Act. That is the jurisdictional limit of the election court's power. The power to disqualify the Speaker or a member lies with the respective Houses of Representative which in the case of Sarawak is the Dewan. As observed by Mohamed Azmi J (as he then was) in *Fan Yew Teng v. Setia Usaha, Dewan Ra'ayat & Ors* [1975] 1 LNS 39; [1975] 2 MLJ 40:

> I find no other provision in the Constitution to suggest that the power to decide on question of disqualification being given to any other body or person.

**[45]** It is therefore untenable for the respondent to argue that art. 118 of the Federal Constitution read with s. 32(e) of the Election Offences Act ousts the jurisdiction of the Dewan and that consequently a member of the Dewan can only be disqualified and removed from the House by an election judge by way of an election petition and not by way of proceedings under art. 19(1) of the Sarawak Constitution.

**[46]** Clearly, there is no conflict between the two constitutional provisions and art. 118 of the Federal Constitution does not override or supersede art. 19(1) of the Sarawak Constitution. For this reason, I find no merit in the respondent's argument that art. 19(1) of the Sarawak Constitution is void for being inconsistent with art. 118 of the Federal Constitution.

**[47]** It is interesting to note in passing that the requirement of art. 118 of the Federal Constitution had in fact been adhered to when the defeated candidate, Hii King Chiong filed the election petition to nullify the respondent's election except that it was knocked out on a technicality. The fact that there was no appeal against the striking out order is of no consequence because the requirement of art. 118 of the Federal Constitution had been adhered to. Further, it remains pure speculation which way the result of the election petition would have gone had the merits of the petition been considered by the election judge.

**[48]** Assuming for a moment that the petition was dismissed on the merits instead of being struck out on a technicality and the respondent was accordingly appointed to the Dewan as an elected member of the House, would that bar the Dewan from initiating proceedings to disqualify the respondent from being a member of the House under art. 19(1) of the Sarawak Constitution? I do not think so because the question whether a member continues to be qualified as an elected member of the Dewan after his appointment to the House is the sole prerogative of the House to decide under art. 19(1) of the Sarawak Constitution. The member's remedy if he is dissatisfied with the decision is to bring the matter to court. In any event, being a non party to the election petition filed by Hii King Chiong, the Dewan was not bound by the decision of the election court.

**[49]** With due respect to the learned lead counsel for the respondent, his argument that the jurisdictional parameters of the Dewan under art. 19(1) of the Sarawak Constitution is confined to post-election disqualification and not to pre-election disqualification is without legal basis. There is nothing in the Sarawak Constitution or the Federal Constitution to warrant such demarcation of jurisdiction. Article 19(1) must be given a purposive interpretation which, if adopted, confers on the Dewan the jurisdiction to determine whether the speaker or a member should vacate his seat whenever the question of his qualification "arises".

**[50]** I am inclined to agree with Datuk Talat Mahmood, the learned State Attorney General that the jurisdiction of the Dewan under art. 19(1) does not depend on whether the act of disqualification occurs pre-election or post-election but at the point of time "If any question arises" whether the Speaker or a member of the Dewan has ceased to be qualified for appointment or election to the House.

**[51]** A member "has ceased to be qualified" within the meaning and contemplation of art. 19(1) of the Sarawak Constitution if his continued presence in the Dewan has become untenable due to his status as a person who is not qualified for election to the Dewan by operation of art. 17(1)(g), regardless of whether he commits the disqualifying act before or after his

election to the House. The reason for this is very simple. Membership to the Dewan is reserved exclusively for those who are qualified for election to the Dewan and not for those who are not even eligible to stand for election to the House for having committed a disqualifying act under art. 17(1)(g).

**[52]** The majority relied heavily on the decision of the Supreme Court of India in *The Election Commission, India v. Saka Venkata Subra Rao Union of India* (1953) SCR 1144 to decide on jurisdiction. In that case, both the High Court of Madras and the Supreme Court of India held that since the alleged disqualification of the respondent arose long before the election, the proper forum to decide the matter was the election court by way of an election petition under art. 191(1)(d) of the Indian Constitution, which corresponds with art. 17(1)(g) of the Sarawak Constitution.

**[53]** It was also held that art. 190(3) and art. 192(1) of the Indian Constitution, which according to learned counsel for the respondent correspond with art. 18(2) and art. 19(1) of the Sarawak Constitution, do not apply to a pre-election disqualification and that art. 329 of the Indian Constitution which corresponds with art. 118 of the Federal Constitution was a bar to the Legislative Assembly's decision.

**[54]** With all due respect to the majority, the decision in that case must be confined to its own peculiar facts and circumstances. It is to be noted, first and foremost, that the case involved a matter that was not before the Legislative Assembly, unlike the present case which involved a matter that was to be decided by members of the Dewan within the four walls of the House under art. 19(1) of the Sarawak Constitution.

**[55]** *Saka Venkata Subra Rao (supra)* dealt with a matter that was wholly outside the Legislative Assembly. Further, the case involved a remediable disqualification unlike the present case where the disqualification is not redeemable and is continuing and unforgivable. As pointed out by learned counsel for the first appellant, what happened in that case was this:

(i) the Election Commission, a statutory authority in New Delhi was restrained by the High Court from enquiring into the respondent's alleged disqualification to be a member of the Madras Legislative Assembly for having been convicted of a criminal offence. There was no issue of justiciability or parliamentary privilege surrounding the core business of the Assembly. By comparison it does on the facts of the present case;

(ii) the Election Commission rejected the respondent's application for exemption from disqualification and referred the respondent's disqualification to the Governor of Madras. The Governor, in turn, forwarded the case to the Election Commission for the Commission's opinion as required by art. 192 of the Indian Constitution;

(iii) no issue arose as to the privilege of the Legislative Assembly in carrying out its core functions. It does on the facts of the present case;

**[56]** Given the divergent factual matrix between *Saka Venkata Subra Rao (supra)* and the present appeals, I agree with the appellants that from a precedent point of view, the decision has little or no value. Mary Lim Thiam Suan JCA in her dissenting judgment had rightly distinguished the factual and legal features of the two cases in paras. [302] and [303] of her judgment which are reproduced below:

> [302] Finally, with respect, I must say that I am not persuaded by the decisions of the Supreme Court of India. Those cases do not deal with similar factual matrix or even similar legal provisions. In the light of my observations on citizenship, those cases dealing with remediable disqualification by reason of conviction are not, with respect, of persuasive value.
>
> [303] In view of the stark absence of provisions for the cessation of disqualification by for example an act of renunciation of the foreign citizenship, I find that it would be inappropriate if not wrong for the court to read into art. 17(1)(g) such a removal of disqualification or even an exemption or cessation of such disqualification. The presence of express removal or cessation of disqualification in art. 17(3) fortifies our view that the absence of such removal or cessation of disqualification is both deliberate and intended under the Sarawak State Constitution and the Federal Constitution.

**[57]** In rationalising that art. 19(1) of the Sarawak Constitution is not intended to cover pre-election disqualification, the majority made comparisons between art. XXXIV of the Perak Constitution and art. 19(1) of the Sarawak Constitution. This is how Abang Iskandar Abang Hashim JCA dealt with the matter:

> [63] My take after reading the Perak Constitutional provisions is that art XXXIV therein, provides for three very important provisions. First, it says that if a member of the Assembly becomes disqualified for membership of the Assembly, his seat falls vacant. The word 'becomes' connotes a supervening event that happens after the person who is properly qualified is validly elected as a member of the Perak State Assembly. It means that during his tenure as a member of the Perak State Assembly, he incurs the disqualification. Secondly, it makes it very clear that if a person had been wrongly elected as a member of the Perak State Assembly, when in fact

A he is disqualified from standing for election, then that art XXXIV renders the purported election to be void by operation of law. It even goes further back in time to void the nomination of the disqualified person. In other words, the question of a person circumstanced as the plaintiff shall have his election be declared as void as a matter of law, both in Perak and the Federal Parliament.

B ...

[65] In the absence of such an express provision in the Sarawak Constitution, can the Dewan undertake such an exercise pertaining to the MM dated 12 May 2017 within the ambit of arts 18(1)(a) and 19(1)(a)?.

C **[58]** The learned judge went on to say at para. [75]:

[75] It appears to me that arts 16, 17, 18 and 19 of the Sarawak Constitution read together, have created two separate and distinct regimes, in dealing with the issue of disqualification. Articles 16 and 17 deal with disqualifications of a person prior to election or pre-election.
D Articles 18 and 19 deal with disqualification of an elected member post-election. While I agree with learned counsel for the Defendants that those articles do not employ the words such as 'prior' or 'pre-election' or post-election', I see nothing wrong in using those words to describe the plausible effects of those articles read together, in that manner.

E **[59]** Articles 16 and 18 (sub-para. (2)(a) is relevant) of the Sarawak Constitution referred to by the learned judge in the above passage provide as follows:

Article 16

16. Every citizen of or over the age of twenty-one years who is resident
F in the State is qualified to be elected as an elected member of the Dewan Undangan Negeri, unless he is disqualified for being such a member by the Federal Constitution or this Constitution or by any such law as is mentioned in art. 17.

Article 18(2)(a)

G (2) An elected member shall also vacate his seat in the Dewan if:

(a) he ceases to be qualified for election as such member of the Dewan;

**[60]** The learned judge then concluded at para. [83]:

The choice of the words used 'has ceased' and 'ceases' connote a
H situation where the member was properly qualified for election but has since lost that qualified status when, as a member of the Dewan, he committed an act of disqualification under art 18(2)(a). **This scenario did not happen in this case before us**.

(emphasis added)

I

**[61]** Taking into consideration the unanimous decision of the Court of Appeal that the respondent's disqualification was continuing and unforgivable, I am in agreement with learned counsel for the first appellant that the emphasised finding in the passage above in fact reaffirmed the Court of Appeal's decision that the respondent was and remained a person who was disqualified for election to the Dewan. It therefore makes no difference that his disqualification was pre-election or post-election as his status as a disqualified person remained unchanged.

**[62]** The majority cited with approval the following passage in the academic work by Ahmad Masum in his article titled "*Parliamentary Privilege and its Practice in Malaysia: An Overview* [2012] 2 MLJ c-cxviii in acceding to the respondent's argument that the jurisdiction of the Dewan is confined to post-election disqualification and after the member has been appointed to the House. This is what the learned writer has written at p. cvi:

> Regardless of the implication of art. 53(1) of the Federal Constitution it is of immense importance to note that there are several exceptions to this rule. For example, art 53(1) applies only to post election or post appointment disqualification. Hence, the Houses are the sole determinant of the question of whether an MP, already elected to the Dewan Rakyat, or a Senator already elected or appointed to the Dewan Negara, is eligible to continue to sit in the House.

**[63]** My reading of the passage is that the writer is absolutely right because art. 53(1) of the Federal Constitution, like art. 19(1) of the Sarawak Constitution, is aimed at members who are already elected or appointed to the House post-election, just like the respondent in the present appeals, and not at non-members of the Dewan who for obvious reasons do not come under the jurisdiction of the House.

**[64]** It is clear therefore that the writer's opinion does not support the respondent's argument that the Dewan has no jurisdiction over sitting members who suffer and continue to suffer from an irredeemable and unforgivable pre-election disqualification. In fact, it supports the appellants' argument that it is the Dewan that has the power to determine the question whether a member who has already been elected or appointed to the House is eligible to continue to sit in the House as an elected member.

**[65]** Even if the writer's opinion coincides with the respondent's argument, for reasons which I have alluded to in dealing with the Dewan's jurisdiction under art. 19(1) of the Sarawak Constitution, I am not prepared to accept the opinion if the meaning it intends to convey is that a person who is disqualified for election to the Dewan has the right to remain in the House as an elected member after getting his way into the House unlawfully.

**[66]** It bears repeating that all three judges of the Court of Appeal had decided, which I fully agree with, that the respondent's disqualification was a continuing disqualification due to the fact that his act of acquiring foreign citizenship was irredeemable and unforgivable, unlike acts of disqualification envisaged by art. 17(3) of the Sarawak Constitution, which provides:

> (3) The disqualification of a person under para. (d) or para. (e) of clause (1) may be removed by the Yang di-Pertua Negeri and shall, if not so removed, cease at the end of the period of five years beginning with the date on which the return mentioned in para. (d) of that clause was required to be lodged, or, as the case may be, on the date on which the person convicted as mentioned in para. (e) of that clause was released from custody, or the date on which the fine mentioned in that paragraph was imposed; and a person shall not be disqualified under para. (g) of clause (1) by reason only of anything done by him before he became a citizen.

**[67]** The exclusion in art. 17(3) of any of the acts of disqualification in para. (g) of art. 17(1) could not have been an oversight by the framers of the Sarawak Constitution. It was done on purpose. Article 17(1)(g) must therefore be construed to mean that a citizen who has voluntarily acquired foreign citizenship cannot remove the disqualification simply by renouncing that foreign citizenship, as the respondent purported to do in the present case. It is clear that the Legislative intent behind art. 17(1)(g) is to disqualify for an indefinite period a person who has voluntarily acquired foreign citizenship.

**[68]** It may appear harsh but a person who aspires to be a member of the Dewan, the highest policy and law-making body in the State, must, as of necessity, be a person of unquestionable and undivided loyalty to Malaysia which Sarawak is part of. In fact, the respondent by having acquired the citizenship of Australia was and still is liable to be deprived of his Malaysian citizenship under art. 24(1) of the Federal Constitution which provides:

> 24. (1) If the Federal Government is satisfied that any citizen has acquired by registration, naturalisation or other voluntary formal act (other than marriage) the citizenship of any country outside the Federation, the Federal Government may by order deprive that person of his citizenship.

**[69]** The deprivation of citizenship is a severe form of action against a citizen for having acquired foreign citizenship. It is a reflection of how seriously the Federal Constitution views the act. The object is to prevent a citizen from acquiring and denouncing his foreign citizenship at will, as and when it suits him, while at the same time refusing to give up his Malaysian citizenship. Either he remains loyal to Malaysia or he gives his loyalty to his adopted foreign country. He cannot have the best of both worlds.

**[70]** In the present case, it is obvious that before the respondent renounced his Australian citizenship to contest in the Sarawak State General Election, he was a person with dual citizenship, which Malaysia does not recognise. He had even exercised the rights of an Australian citizen by registering as a voter with the Australian Election Commission. His voting district was the State District of Port Macquarie in the Local Government area of Port Macquarie-Hastings.

**[71]** It may be of interest to know that there are two alternative versions of the Australian pledge of loyalty which a person acquiring the citizenship of Australia can choose from, as follows:

> Pledge 1
>
> "From this time forward under God, I pledge my loyalty to Australia and its people, whose democratic beliefs I share, whose rights and liberties I respect and whose laws I will uphold and obey."; or
>
> Pledge 2
>
> "From this time forward I pledge my loyalty to Australia and its people, whose democratic beliefs I share, whose rights and liberties I respect and whose laws I will uphold and obey."

**[72]** The respondent's loyalty at all times should be to Malaysia and to Malaysia alone. By voluntarily acquiring Australian citizenship, pledging loyalty to Australia and exercising the rights of an Australian citizen, the respondent's loyalty to Malaysia is questionable, notwithstanding his renunciation of that country's citizenship. The Dewan was therefore justified in disqualifying and removing him from the Dewan as he is a person who is unfit to be a member or to continue to be a member of the House.

**[73]** The respondent had also been less than candid when he affirmed in a statutory declaration (borang 5A) on 22 April 2016 as part of the nomination process for the general election that he had not lost his eligibility to be a member of the Dewan. He knew at the time he signed the statutory declaration that the averment was untrue as he had acquired Australian citizenship before renouncing it, which was a disqualifying act under art. 17(1)(g) of the Sarawak Constitution, but he chose to conceal that fact from the knowledge of the Election Commission. That in itself is a serious transgression of the law by a person who aspired to be a member of the highest law-making body in the State.

**[74]** It was further argued by learned counsel for the respondent that if the Dewan were to be allowed to decide on a member's disqualification incurred before his election to the Dewan, this would infringe on the doctrine of separation of powers whereby the Dewan would be encroaching into the powers of the Judiciary, in this case the election court. *Semenyih Jaya Sdn*

*Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526; [2017] 3 MLJ 561 was cited in support.

**[75]** With due respect to learned counsel, the question of infringing the doctrine of separation of powers does not arise as the power to decide on the qualification of the respondent as a member of the Dewan resides in the Dewan under art. 19(1) of the Sarawak Constitution and not the court. It is the court, if at all, that will be infringing on the doctrine if it were to interfere with the exercise of that power, unless it can be shown that the power had been exercised improperly and in excess of jurisdiction.

**[76]** Which brings me to art. 72(1) of the Federal Constitution, a provision that gives immunity to the validity of proceedings in the Dewan from judicial interference. This is what the article says:

> The validity of any proceedings in the Legislative Assembly of any State shall not be questioned in any court.

**[77]** Nothing can be clearer than that. Being a provision of the supreme law of the Federation, art. 72(1) prevails over any written law passed after Merdeka Day that is inconsistent with it: See art. 4(1). If even a written law passed by Parliament or the State Legislature cannot prevail over art. 72(1) if it is inconsistent with the provision, it stands to reason that no common law doctrine can prevail over the constitutional provision.

**[78]** The majority did not seriously and adequately direct their mind to this article because, as mentioned earlier, the focus of their attention was on the issue of jurisdiction. Article 72(1) of the Federal Constitution deals with the issue of justiciability which had been definitively decided by this court in *Teng Chang Kim v. Badrul Hisham Abdullah & Anor* [2017] 9 CLJ 630; [2017] 5 MLJ 567. The case concerns the decision of the Speaker of the Selangor State Assembly to declare vacant a seat because of a State Assemblyman's absence from sittings of the Assembly for six months without the Speaker's leave. At para. [23] this is what the court said:

> Thus, there can be no doubt that **the business of Parliament and the State Legislative Assemblies are immune from judicial interference**. The courts have no power to interfere with the internal management of Parliament or any State Legislative Assembly. This immunity arises from the doctrine of separation of powers between the three principal organs of government, namely, the executive, the legislature and the judiciary.
>
> (emphasis added)

**[79]** In concluding, the court held at para. [51]:

> In conclusion, we are of the view that in the present case, the Speaker was acting within the limits of the power given to him under Article 69 of the Selangor Constitution when he declared the N46 Pelabuhan Klang Constituency seat vacant. Even though the declaration was made outside the SLA proceedings, it was inevitably connected with the essential business of the SLA, made within the parameters set out by Article 69 of the Selangor Constitution, and was made to regulate the internal affairs of the SLA. Consequently, we rule that **the Speaker's act is non-justiciable** and the Speaker is entitled to the protection of parliamentary privilege enjoyed by the SLA as provided for under Article 72(1) of the Federal Constitution.
>
> (emphasis added)

**[80]** The court reiterated its earlier decision in *Teng Chang Khim & Ors v Dato' Raja Ideris Raja Ahmad & Ors* [2014] 3 CLJ 173 that art. 72(1) of the Federal Constitution provides an "absolute immunity" against judicial review of proceedings in the Selangor Legislative Assembly.

**[81]** *Lim Cho Hock v. Speaker, Perak State Legislative Assembly* [1979] 1 LNS 45; [1979] 2 MLJ 85 is another case on point. In that case, the Speaker applied to set aside the originating summons on the ground that the court had no jurisdiction to hear the Assemblyman's application to, *inter alia*, declare an Assemblyman's seat (who happened to be the Speaker himself) vacant. In disallowing the claim, Eusoffe Abdoolcader J (as he then was) held:

> In the light of these constitutional provisions, it is clear that **the two matters raised in these proceedings are for the Assembly to decide and within its exclusive jurisdiction, and not for the courts to determine**. Under the *lex et consuetudo parliamenti*, the Assembly has control over its proceedings, procedure and members and may decide questions as to the qualifications and disqualifications. The provisions in the Federal and State Constitutions I have discussed crystallise and encapsulate this important principle of non-justiciability of its intra-mural activities in the courts which may perhaps be appropriately termed the *Bradlaugh* principle, highlighted in the *Bradlaugh v. Gosset* (1984) 12 (QBD) 271.
>
> (emphasis added)

**[82]** It needs to be mentioned also that this court in *Teng Chang Kim* (*supra* at para. [78] above) had affirmed as correct the decision of the High Court in *Fan Yew Teng v. Government of Malaysia* [1976] 1 LNS 28; [1976] 2 MLJ 262 where Chang Min Tat J (as he then was) held:

A

> The issue in his application is the right of the plaintiff to sit in the Dewan Ra'ayat and, in my view and with respect, this issue comes fully within the compass of Article 53 and Article 63. The issue therefore involves the proper and reasonable construction of these articles. The language is plain and unambiguous. Giving the words therein their plain and grammatical meaning, the decision on this issue is for the House to take, it is final when taken and the validity of the proceedings cannot be questioned in any court ...
>
> On this construction, I must necessarily go on to hold that **this court cannot interfere with the right of the Dewan to decide the question of the plaintiff becoming disqualified for membership** or the corresponding right of the Dewan under the proviso to Article 53 to decide ...
>
> (emphasis added)

B

C

**[83]** There the High Court was dealing with art. 53(1) of the Federal Constitution which is identical though not similar word for word with art. 19(1) of the Sarawak Constitution. It reads:

D

> 53. (1) If any question arises whether a member of a House of Parliament has become disqualified for membership, the decision of that House shall be taken and shall be final:
>
> > Provided that this Article shall not be taken to prevent the practice of the House postponing a decision in order to allow for the taking or determination of any proceedings that may affect the decision (including proceedings for the removal of the disqualification).

E

**[84]** The effect of art. 72(1) of the Federal Constitution on the decision by the Dewan to disqualify and remove the respondent from the House is that the decision "shall not be questioned in any court". Thus, so long as the Dewan had acted within the limits of its power, the court would be in breach of art. 72(1) of the Federal Constitution if it interfered with the exercise of that power. The court is therefore barred from questioning the validity of the decision taken by the Dewan under art. 19(1) of the Sarawak Constitution. The common law doctrine of separation of powers does not and cannot prevail over a constitutional provision like art. 72(1) of the Federal Constitution.

F

G

**[85]** The moving of the ministerial motion to decide on the qualification of the respondent as a member of the Dewan, the attendant debate on the motion and the voting on the motion were all matters that came within the core business of the Dewan. The whole proceedings of the Dewan therefore attract privilege and must remain inviolable: See *R v. Chaytor* [2011] 1 AC 684; *Teng Chang Kim* (*supra* at para. [78] above); *Yang Dipertua, Dewan Rakyat & Ors v. Gobind Singh Deo* [2014] 9 CLJ 577; [2014] 6 MLJ 812.

H

I

**[86]** Had the majority applied their mind adequately to the issue of justiciability, they would have decided that the decision of the Dewan to disqualify and remove the respondent from the House, taken as it was under and in accordance with art. 19(1) of the Sarawak Constitution, was immune from judicial interference by operation of art. 72(1) of the Federal Constitution.

**[87]** Having regard to established canons of constitutional interpretation, the issue of jurisdiction in these appeals ought to have been resolved by giving a proper and reasonable interpretation to art. 19(1) read with art. 17(1)(g) of the Sarawak Constitution. This is where, with respect, the majority fell into error in failing to apply the principles correctly to the facts of the case, resulting in the emasculation of the Dewan's power to regulate and to decide on issues of membership and qualification under art. 19(1) of the Sarawak Constitution.

**[88]** It is also trite principle that the court should be loathe to read into the Constitution matters that are not there, such as reading into arts. 17(1)(g) and 19(1) of the Sarawak Constitution the dichotomy between pre-election disqualification and post-election disqualification when the two provisions should be read contextually, dynamically and harmoniously. The words 'pre-election', 'post-election' or words to that effect are conspicuous by their absence in the two articles. The learned High Court Judge who heard the originating summons was right when he said "I am not prepared to read into art. 17(1)(g) something which is not there."

**[89]** Further, the approach taken by the majority in construing the words "has ceased" and "ceases" in arts. 19(1) and 18(2)(a) respectively of the Sarawak Constitution was too rigid and pedantic which resulted in the majority concluding that arts. 16, 17, 18 and 19 are divided into two separate and distinct jurisdictional regimes, that is, pre-election jurisdiction and post-election jurisdiction which inevitably led to the deployment of the illusory pre-election and post-election disqualification dichotomy.

**[90]** The dichotomy is non-existent simply because the Dewan's jurisdiction under art. 19(1) is only over members of the Dewan and not over non-members who had committed any act of disqualification under art. 17(1)(g), which appears to have predominated the majority's mind in grappling with the issue of jurisdiction.

**[91]** With due respect, the majority's reasoning is flawed as it completely ignores the fact that being a member of the Dewan, the respondent comes under the jurisdiction of the House even though he committed the disqualifying act before he was appointed to the House. It has been held,

A *albeit* in the context of a criminal case, that art. 17(1)(g) applies to both pre-election disqualification as well as post-election disqualification: See *Fan Yew Teng* (*supra* at para. [44] above).

**[92]** Reading art. 17(1)(g) of the Sarawak Constitution with art. 48(1)(f), art. 19(1) and art. 53(1) of the Federal Constitution, it is clear that the Dewan B was fully clothed with the jurisdiction, authority and power to disqualify and remove the respondent from the Dewan for having acquired Australian citizenship prior to his election and appointment to the House.

**[93]** Thus, while the majority was right in holding that art. 72(1) of the Federal Constitution only applied if the Dewan was seized with jurisdiction C to disqualify the respondent under art. 19(1) of the State Constitution, they were wrong in finding that the Dewan had no such jurisdiction. The error is serious enough to warrant interference by this court.

**[94]** I shall now deal with a point that was raised for the first time by D learned counsel for the respondent in these appeals, which is the issue of breach of the rules of natural justice. It constituted a major and substantial part of his argument before us. The contention was that the Speaker had blatantly breached the rules of natural justice and that this nullified the decision of the House to disqualify the respondent.

E **[95]** The issue of breach of the rules of natural justice was not a leave question for our determination, nor was it a matter that the Court of Appeal dealt with and decided on. It was for these reasons that learned counsel for the appellants strenuously objected to the issue being raised at the hearing of these appeals but we decided to hear submissions by the parties in view of F the general importance of the matter in all the circumstances of the case, including in particular the failure by the majority to consider the issue although vigorously argued by the respondent at the hearing before the Court of Appeal and which the High Court had in fact decided in the respondent's favour.

G **[96]** Recently, this court in *Penguasa, Tempat Tahanan Perlindungan Kamunting, Taiping & Ors v. Badrul Zaman PS Md Zakariah* [2018] 8 CLJ 273; [2018] MLJU 1028 reiterated the principle that the courts have untrammeled discretion to allow a question of law to be raised for the first time on appeal, in the interest of justice having regard to the circumstances of the case and H where it is appropriate to do so. The only fetter I must add is that the discretion must be exercised very sparingly and in the most suitable of cases, for if it were otherwise the statutorily prescribed procedure for appealing to this court will be rendered nugatory and open to perpetual abuse which in turn will cause uncertainty to the finality of litigation.

I

**[97]** We were told by learned counsel for the respondent that the Speaker constantly interrupted the speech given by the respondent and members of the opposition in the course of the debate on the ministerial motion, to the extent of repeatedly switching off their microphones to prevent them from debating the issue. This however is not reflected in the appeal record.

**[98]** The respondent also took exception to the Speaker's refusal to give the respondent sufficient time to prepare for his defence to the ministerial motion and that the whole process lasted less than two hours. It was argued that "the degree of unreasonableness coming from the Speaker (against an elected member of DUN) is grossly unjust and unprecedented."

**[99]** The learned High Court Judge who heard the originating summons was on the same page with the respondent on this issue when he said:

> I agree with the plaintiff ... This Rules of Natural Justice and procedural fairness were not adhered to. By taking an active part in the debate, the Speaker had descended into the arena of conflict and debate. He played an active role to promote the ministerial Motion and in doing so is no longer seen to be acting impartial. The plaintiff had submitted the Speaker had acted as the prosecutor and judge. As can be seen at page 21 of the Hansard the Speaker even knew beforehand that the member for Mambong will second the Motion. This implied pre-arranged plans and the Speaker was aware of it.

**[100]** Reference was made by learned counsel for the respondent to the judgment of Raja Azlan Shah FJ (as His late Royal Highness then was) in *Ketua Pengarah Kastam v. Ho Kwan Seng* [1975] 1 LNS 72; [1977] 2 MLJ 152 where the learned judge said:

> In my opinion the rule of natural justice that no man may be condemned unheard should apply to every case where an individual is adversely affected by an administrative action, no matter whether it is labelled "judicial", "*quasi* judicial" or "administrative" or whether or not the enabling statute makes provision for a hearing.

**[101]** We were also referred to art. 135(2) of the Federal Constitution which provides that no member of the public services shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard which according to learned counsel fortified his argument on the importance of giving the right of hearing to the respondent before disqualifying and removing him from the Dewan.

**[102]** It was further contended that since the Court of Appeal did not address the issue of natural justice and made no finding on it, the Court of Appeal must be taken to have agreed with the High Court's decision that the Speaker had acted unfairly, thus rendering the Dewan's decision bad in law and unconstitutional.

**[103]** With due respect to learned counsel for the respondent, his reliance on *Ho Kwan Seng* and art. 135(2) of the Federal Constitution is misconceived. *Ho Kwan Seng* involved an administrative action by an administrative body whilst art. 135(2) of the Federal Constitution concerns the procedure for the dismissal of public servants who comprised the following: the armed forces; the judicial and legal service; the general public service of the Federation; the police force; the joint public services mentioned in art. 133; the public service of each State; and the education service.

**[104]** Obviously, the Speaker is not a public servant under the Federal Constitution and in any event the decision to disqualify the respondent was not his decision. It was the collective decision of the Dewan by a majority vote of 70 to 10. More importantly, the decision of the Dewan was not an administrative decision by an administrative body over an administrative officer but an exercise of power by the legislative body over a member of the Dewan under art. 19(1) of the Sarawak Constitution which is shielded from judicial interference by art. 72(1) of the Federal Constitution.

**[105]** Even if the rule of natural justice applies, the complaint of its breach by the respondent is not borne out by the facts. It is true that the Speaker made certain remarks in the course of the debate on the ministerial motion but I do not find anything wrong or illegal with that. It is not as if the Speaker had hijacked the whole proceedings without giving members of the Dewan the opportunity to speak before he put the ministerial motion to a vote and before announcing the Dewan's decision to disqualify the respondent and to order his removal from the House. In any case, it is unrealistic to expect the Speaker to keep a stony silence while members of the Dewan were debating the motion, which in this case was heated as the Hansard shows. It was the Speaker's job to control proceedings in the Dewan.

**[106]** It is of paramount importance to bear in mind that proceedings in the Dewan are not proceedings in a court of law where strict adherence to the law of evidence and procedure must be observed. The Dewan has its own rules and regulations and the Speaker is vested with the power to enforce those rules and regulations to ensure that proceedings in the Dewan are conducted in an orderly manner. It is far-fetched in my view for learned counsel to suggest that the 70 State Assemblymen who voted in favour of disqualifying the respondent had been influenced by the Speaker's remarks during the course of the debate on the ministerial motion. There is in any event no evidence to support the suggestion.

**[107]** The record of appeal at pp. 668 to 676 of vol. 4(1) shows that the respondent was given every opportunity by the Speaker to defend himself in answer to the ministerial motion. The fact of the matter is he took active part in the proceedings after the Speaker had asked if anyone from the opposition wanted to speak.

**[108]** The Hansard further shows that the respondent had duly exercised his right to give his side of the story after Dato Sri Wong Soon Koh finished giving his speech in support of the ministerial motion. This was followed by Chong Chieng Jen from the opposition who too gave a speech in defence of the respondent. In the circumstances, there was no evidential basis for the respondent to complain that he was not given the right of hearing, in breach of the rules of natural justice.

**[109]** On the respondent's complaint that the Speaker refused to give him sufficient time to prepare for his defence to the ministerial motion, I do not think that by itself had occasioned any miscarriage of justice. The issue before the Dewan was the very same issue that was ventilated before the election court in the election petition filed by Hii King Chiong. The respondent was the defendant in that action. Therefore, he must have had all the facts, including the relevant documents, when facing the ministerial motion even on short notice.

**[110]** The question for the respondent to answer in the proceedings before the Dewan was whether he had acquired the citizenship of Australia before he stood for election in the State Constituency of N17 Pujut. It was a simple question that required a simple answer. Yet, instead of answering the question with a yes or no answer during the debate on the ministerial motion, the respondent challenged Dato Sri Wong Soon Koh, the Minister who moved the motion, to ask the same question to other members of the Dewan, specifically the member for Batu Kawa.

**[111]** It is obvious that the respondent refused to admit that he had indeed voluntarily applied for and acquired Australian citizenship before standing for election in the State Constituency of N17 Pujut. But for reasons that are not entirely clear, he is no longer denying this fact. The respondent's refusal to admit having acquired Australian citizenship can be seen in the following exchanges between him and Dato Sri Wong Soon Koh as recorded in the Hansard and which is reproduced at p. 673 of the appeal record:

> Minister for Finance II and Minister for International Trade and Commerce (YB Dato Sri Wong Soon Koh): Sit down, listen to me. As has been pointed out, that this House has the right to make this decision. Now, I asked the Member for Pujut, did you acquire Australian citizenship? Did you? Answer me … No, you answer me. Did you acquire Australian citizenship? You answer that. You answer me.

Tuan Speaker: Ahli Yang Berhormat for Pujut, you answer.

Minister for Finance II and Minister for International Trade and Commerce (YB Dato Sri Wong Soon Koh): Did you acquire Australian citizenship? It is a straightforward question.

YB Dr Ting Tiong Choon: Tuan Speaker and Ahli Yang Berhormat for Bawang Assan and all members in this House. I came to Sarawak a few years ago. I have all this time intended to come back to Sarawak.

Minister for Finance II and Minister for International Trade and Commerce (YB Dato Sri Wong Soon Koh): No. no. no. I want you to answer my question. Okay. Did you acquire Australian citizenship? Yes or no. Simple answer. Yes or no?

YB Dr Ting Tiong Choon: Would you ask any other members of this august House, do they have citizenship in other countries?

Minister for Finance II and Minister for International Trade and Commerce (YB Dato Sri Wong Soon Koh): No, no. No. I asked you.

YB Dr Ting Tiong Choon: I don't have to prove that to you. You need to show. You make the allegations, you need to tell me that I have Australian citizenship otherwise you need to ask all the other Dewan Members whether they have other foreign citizenship. Do you dare to ask our Honourable Member for Batu Kawa whether he has an Australian citizen? So, I think … (Interruption). Just listen to me. You have plenty of chances.

Tuan Speaker: This is not a motion against Honourable Member for Bawang Assan. This is a motion against you. Did you or did you not acquire the Australian citizenship?

YB Dr Ting Tiong Choon: That is not the Motion. That is not the Motion.

Tuan Speaker: That is central to the Motion. Did you or did you not acquire?

YB Dr Ting Tiong Choon: I said it many times. All those presented by Honourable member of Bawang Assan, a lot of them are not evidence. No one in the right mind will actually believe this sort of evidence. It is contradicting.

Tuan Speaker: Proceed.

**[112]** As for learned counsel's contention that the Court of Appeal must be taken to have agreed with the High Court decision when it did not address the issue of natural justice and made no finding on it, I do not think the argument can be stretched that far. In the first place, the failure by the Court of Appeal to affirm the decision of the High Court on the issue of natural justice was a failure that adversely affected the respondent more than it affected the appellants.

**[113]** The appellants' appeals were against the whole of the decision of the Court of Appeal and this should be wide enough to cover the High Court's finding that the Speaker had breached the rules of natural justice. It was the respondent who should, in the circumstances, have cross-appealed against such failure by the Court of Appeal, or at the very least to apply for the issue to be added as a leave question at the leave stage. Yet for some unexplained reasons, he chose not to.

**[114]** For all the reasons aforementioned, my answers to the leave questions are as follows:

Question 1 - Affirmative, that is the Dewan has the power under art. 19(1) of the Sarawak Constitution to make a decision on the continued membership of an elected member whenever a question is raised in the Dewan as to whether that member is qualified for election to the Dewan under art. 17(1)(g) of the Sarawak Constitution.

Question 2 - Negative, that is the business or proceedings of the Dewan (including but not limited to the ministerial motion on 12 May 2017) is not justiciable, in view of the provisions of *inter alia* art. 19(1) of the Sarawak Constitution read with art. 72(1) of the Federal Constitution.

Question 3 - Negative, that is upon a proper interpretation of art. 17(1)(g) of the Sarawak Constitution, a disqualification for election to the Dewan resulting from voluntary acquisition of foreign citizenship and the exercise of rights accorded to a foreign citizen in that foreign country, cannot be removed and ceased in the absence of provision in art. 17(3) or any article of the Sarawak Constitution for the removal or cessation of such disqualification.

Question 4 - Negative, that is there is no conflict between art. 17(1)(g) and art. 19(1) of the Sarawak Constitution and art. 118 of the Federal Constitution.

Question 5 - Negative, that is an election petition pursuant to art. 118 of the Federal Constitution is not the only mode that can be utilised to challenge the appointment or election of a member of the Dewan.

Question 6 - Negative, that is a Malaysian citizen who had acquired a foreign citizenship but renounced it before the nomination of an election is not qualified to be nominated as a candidate for an election in light of art. 17(1)(g) of the Sarawak Constitution.

Question 7 - Affirmative for the first part, that is the Dewan has the jurisdiction to decide on the disqualification of an elected member who had previously acquired a foreign citizenship though renounced it before the nomination of an election and negative for the second part, that is such decision of the Dewan is not justiciable in light of art. 19 of the Sarawak Constitution.

**[115]** In the circumstances, I allow the appeals with no order as to costs. The decision of the Court of Appeal is set aside and the decision of the Dewan dated 12 May 2017 is restored.

**[116]** My learned brothers and sisters have read this judgment in draft. Except for the learned Chief Justice and the learned Chief Judge of Sabah and Sarawak who are dissenting, the rest of my brothers and sisters concur with the judgment.

**Tengku Maimun Tuan Mat CJ (dissenting):**

**Introduction**

**[117]** I have read the majority judgment in draft. With greatest respect, I am unable to agree with it. I accordingly deliver this separate judgment indicating the reasons for my disagreement. As my learned brother, Abdul Rahman Sebli FCJ, has adequately summarised the facts in the majority judgment, I only propose to deal with the questions of law relevant to these appeals.

**[118]** For convenience and clarity, I shall collectively refer to the Government of Sarawak, the Dewan Undangan Negeri of Sarawak ('Dewan'), the Honourable Speaker of the Dewan, the Election Commission of Malaysia and Dato Seri Wong Soon Koh – as the appellants. I shall refer to Dr Ting Tiong Choon as the respondent.

**[119]** Having read and carefully considered the majority and dissenting judgments of the Court of Appeal including the supporting judgment which concurs with the majority judgment, it is my view that the majority judgment of the Court of Appeal is not perverse as it had applied the correct principles of law and arrived at a conclusion which any other reasonable tribunal, apprised of the facts and the law, would have arrived at. The majority took into account all the relevant principles of constitutional interpretation and decided cases. I would therefore dismiss these appeals and uphold the majority judgment and orders of the Court of Appeal. My reasons are as follows.

**The Pre-And Post-Election Structure**

**[120]** The Court of Appeal was of the view that these appeals could be simply resolved by determining whether the Dewan has the jurisdiction to disqualify the respondent from membership. In summary, the majority of the Court of Appeal decided, upon a construction of arts. 17 and 19 of the Sarawak Constitution read together with arts. 48 and 53 of the Federal Constitution, that the Dewan did not have such a power. It therefore decided that the matter before it was justiciable and as such, the decision of the Dewan to disqualify the respondent per the ministerial motion dated 12 May 2017 was without jurisdiction and unlawful.

**[121]** In summary, the sole question before this court is whether, upon a proper consideration of arts. 17(1)(g) and 19 of the Sarawak Constitution read together with the Federal Constitution, the Dewan has the jurisdiction to disqualify the respondent from membership when such disqualification was incurred pre-election.

**[122]** Article 48 of the Federal Constitution enlists several factors disqualifying a person from contesting in elections or from membership in either House of Parliament. Article 48(1)(f) disqualifies a person on grounds that he or she, *inter alia*, voluntarily acquired foreign citizenship. The provision is substantially mirrored in art. 17(1)(g) of the Sarawak Constitution. I agree that on a plain reading of the respective constitutional provisions, the mere voluntary acquisition of foreign citizenship or the performance of an act directly related to the rights of citizens of that foreign country is sufficient to amount to disqualification either under art. 48(1)(f) of the Federal Constitution or art. 17(1)(g) of the Sarawak Constitution. The fact that such foreign citizenship was subsequently renounced is therefore irrelevant.

**[123]** Article 53(1) of the Federal Constitution relates to the jurisdiction of Parliament to make decisions as to disqualification. The provision stipulates as follows:

> Decisions as to disqualification
>
> 53. (1) If any question arises whether a member of a House of Parliament has become disqualified for membership, the decision of that House shall be taken and shall be final:
>
> > Provided that this article shall not be taken to prevent the practice of the House postponing a decision in order to allow for the taking or determination of any proceedings that may affect the decision (including proceedings for the removal of the disqualification).

**[124]** Article 19(1) of the Sarawak Constitution is substantially similar to the above provision, and it reads as follows:

> Decision as to disqualification
>
> 19. (1) If any question arises whether the Speaker or a member of the Dewan Undangan Negeri has ceased to be qualified for appointment or election as such, the decision of the Dewan shall be taken and shall be final:
>
> Provided that this article shall not be taken to prevent the practice of the Dewan postponing a decision in order to allow for the taking or determination of any proceedings that may affect the decision (including proceedings for the removal of the disqualification).

**[125]** In my considered view, in construing the Sarawak Constitution, reference must also be made to the Eighth Schedule and art. 71 respectively of the Federal Constitution. The Eight Schedule sets out certain provisions which must be inserted into the Constitution of any State. Article 71(4) suggests that the provisions of any State Constitution must have the same wording as the Eighth Schedule or they must be 'substantially to the same effect'. Accordingly, the interpretation of the provisions of arts. 48 and 53 of the Federal Constitution are instructive as regards the interpretation of the Constitution of any State, in this case, the Sarawak Constitution.

**[126]** The seminal authority in this sense is the decision of Azmi J in *Fan Yew Teng v. Setia Usaha, Dewan Ra'ayat & Ors* [1975] 1 LNS 39; [1975] 2 MLJ 40 ('*Fan Yew Teng No. 1*'). In that case, the plaintiff was successfully returned as the Member of Parliament for Menglembu in August 1974. A year later, he was convicted of a sedition offence and his sentence was sufficient to amount to disqualification under art. 48(1)(e) of the Federal Constitution. He was subsequently informed that by virtue of his disqualification, he had become disqualified for membership and that his seat had accordingly become vacant. The Election Commission then proceeded with a by-election to fill in the vacancy. On these facts, the plaintiff filed an action in the High Court for a declaration, *inter alia*, that his seat did not become automatically vacant and that the decision for a by-election was accordingly unlawful. Therefore, the question before the court was whether the plaintiff's seat became 'automatically vacant' by virtue of his disqualification under art. 48(1)(e).

**[127]** Counsel for the defendants in that case relied on art. 50(1) of the Federal Constitution which provides as follows:

Effect of disqualification, and prohibition of nomination or appointment without consent

50. (1) If a member of either House of Parliament becomes disqualified for membership of that House his seat shall become vacant.

**[128]** The defendants therefore argued that by virtue of the above provision, the plaintiff's seat had become automatically vacant. Azmi J was not persuaded by the argument. In His Lordship's view, arts. 48 and 50 of the Federal Constitution must be read together with art. 53 of the Federal Constitution which requires that the decision of the House must be taken when any question arises as to whether a member of the House has become disqualified for membership.

**[129]** The defendants also argued that art. 53 of the Federal Constitution only applies to 'doubtful' disqualification such that a decision would be necessary to determine whether a disqualification has happened. The defendants submitted that since the disqualification in the case was obvious, there was no need for the House to make a decision and hence, there was no need for the defendants to refer to art. 53 of the Federal Constitution.

**[130]** Azmi J was also not persuaded by this argument because, in His Lordship's view, such argument essentially rendered art. 53 superfluous. His Lordship observed that when it is alleged that a person is disqualified, there must be an appropriate decision-maker to pronounce on that disqualification as required by the provisions of the Federal Constitution. It was in this context that Azmi J held that upon a proper construction of the language of the Federal Constitution in its ordinary language, there does exist a pre- and post-election regime. All decisions as regards pre-election disqualification are for the courts to make while all post-election disqualification are for the House to make. While the grounds for disqualification in the two regimes are commonly housed in art. 48 of the Federal Constitution, the bodies entitled to pronounce on the disqualification are different. Pre-election disqualifications are to be decided by the election court specifically constituted under art. 118 of the Federal Constitution while post-election disqualifications are to be decided by the House, under art. 53 of the Federal Constitution.

**[131]** For completeness, this is what Azmi J held, at p. 41 (MLJ):

Before going into the merits of the conflicting arguments it is necessary to appreciate that art. 48(1) applies to both pre-election and as well as to post-election disqualification. In short, any person who comes within one of the sub-clauses (a) to (f) of this art., will not be fit to be a candidate for membership of the Dewan Ra'ayat or be an appointee of the Dewan Negara; and further, if a sitting Member of Parliament incurs any of the disqualification mentioned in the aforesaid sub-clauses, and no question arises as to his disqualification, he will be disqualified.

A Secondly, it is clearly obvious that arts. 50(1) and 53, as opposed to art. 48(1), apply only to post-election disqualification, i.e. disqualification arising after election of a person to the House of Representatives or appointment to the Senate.

Thirdly, it is also essential to bear in mind that, unlike the constitution
B of some countries with parliamentary system of government, our Constitution does not confer on the House of Representatives the power to decide elections in disputes, but only questions relating to the disqualification of members. *In the case of an election to the House of Representatives, the question of pre-election disqualification including the question of an election on the ground of disqualification of a candidate is given to the High Court*
C *under art. 118, and if the disqualification is established, the election shall be void under art. 50(2).*

(emphasis added)

**[132]** The crucial and broader point made in that case is that when
D disqualification happens, doubtful or not, a decision must be made by the appropriate decision-maker. Because the case concerned a post-election disqualification, the appropriate decision-maker was the House. And, because no decision was made, the holding of the by-election was held to be unlawful and the plaintiff's seat was declared not to be vacant. By extending the *ratio decidendi*, if a disqualification was a pre-election one, the appropriate
E body to decide the validity of the election would have to be the election court established under art. 118 of the Federal Constitution. The House, in that regard, has no power to determine such pre-election disqualification just as the court has no power to decide on post-election disqualification.

F **[133]** Based on my analysis of the provisions of arts. 17(1) and 19(1) of the Sarawak Constitution and given that they are worded substantially the same as arts. 48(1) and 53(1) of the Federal Constitution, it is my considered view that the *ratio decidendi* in the *Fan Yew Teng No. 1* case applies to the present case with equal force. Despite learned counsel for the respondent's assertion that the respondent is not disqualified, it is very obvious on the evidence that
G he had voluntarily acquired foreign citizenship. He is therefore clearly disqualified for election and membership by virtue of art. 17(1)(g) of the Sarawak Constitution. However, the appropriate body to determine his disqualification is the election court and not the Dewan. In other words, because the disqualification incurred by him is a pre-election disqualification,
H the Dewan had no jurisdiction to make the decision to disqualify him *vide* the ministerial motion dated 12 May 2017.

**[134]** In this regard, the decision in *Fan Yew Teng No. 1* has remained good law from when it was first pronounced in 1975. Whilst it is true that judicial precedent plays a lesser role in the interpretation of constitutional provisions
I (see *Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus*

[1984] 1 CLJ 28; [1984] 1 CLJ (Rep) 98; [1981] 1 MLJ 29), I am satisfied that *Fan Yew Teng No. 1* correctly analysed the structure of the Federal Constitution to arrive at the conclusion that a pre- and post-election regime is implied in the Federal Constitution. Accordingly, it is my considered view that the majority of the Court of Appeal did correctly apply *Fan Yew Teng No. 1.*

**Constitutional Interpretation**

**[135]** Learned counsel for the appellants argue that the dissenting judgment of the Court of Appeal ought to be upheld. They make the argument that a purposive construction of the Sarawak Constitution suggests that the pre- and post-election structure does not exist and that the drafters of the Sarawak Constitution did foresee allowing the Dewan to make decisions as to disqualification of members regardless of when such disqualification was incurred. The respondent seemed to suggest that while the dissenting judgment in the Court of Appeal appeared to adopt the *Fan Yew Teng No. 1* judgment in part (in respect of how courts cannot interfere with Parliamentary privileges), the minority of the Court of Appeal deliberately ignored the rest of the *Fan Yew Teng No. 1* decision on the pre- and post-election structure.

**[136]** In my view, these rivalling arguments necessitate constitutional interpretation. The words used in art. 19(1) of the Sarawak Constitution are "has ceased". This is similar to art. 53(1) of the Federal Constitution which uses the phrase "has become". Both phrases, be it "has ceased" or "has become", in their ordinary meaning, suggest that the disqualification must have happened after the given person is already sitting in the Dewan or the House such that the Dewan or the House may make a decision as to his or her membership. In other words, the qualifier "has" preceding the verbs "ceased" or "become" suggest that the disqualifying factor must be a supervening event. Accordingly, interpreting the words "has ceased" in art. 19(1) of the Sarawak Constitution suggests to me that the Dewan has powers to make decisions only in respect of post-election disqualifications.

**[137]** To overcome the language expressed clearly in art. 19(1) of the Sarawak Constitution, the appellants submit that this court ought to take a purposive construction. With respect, I disagree. Such argument appears to be premised on the judgment of Azlan Shah Ag. LP in *Dato Menteri Othman bin Baginda (supra)* where His Lordship advised that the Constitution, being an organic and living document cannot be construed pedantically. In my view, such an approach is only possible where the language of the provision is unclear or ambiguous. Or, where the interpretation concerns the prismatic interpretation of fundamental rights. In this regard, I am guided by the observations of Abdoolcader J in *Merdeka University Bhd v. Government of*

A *Malaysia* [1981] CLJ 175; [1981] CLJ (Rep) 191; [1981] 2 MLJ 356 ('*Merdeka University*'), where at p. 200 (CLJ); p. 360 (MLJ), His Lordship observed:

> I said in *Public Prosecutor v. Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116 … that the Constitution is not to be construed in any narrow or
B pedantic sense (*James v. Commonwealth of Australia*) [1936] AC 578 … *but this does not mean that a court is at liberty to stretch or pervert the language of the Constitution in the interests of any legal or constitutional theory, or even, I would add, for the purpose of supplying omissions or of correcting supposed errors.*
>
> (emphasis added)

C **[138]** In the specific context of interpreting constitutional provisions literally where there is no ambiguity, this is what Chang Min Tat J observed in *Fan Yew Teng v Government of Malaysia* [1976] 1 LNS 28; [1976] 2 MLJ 262 ('*Fan Yew Teng No. 2*'), at p. 266 (MLJ) (in dealing with post-election disqualification):

D
> The issue in his application is the right of the plaintiff to sit in the Dewan Ra'ayat and, in my view and with respect, this issue comes fully within the compass of art. 53 and art. 63. The issue therefore involves the proper and reasonable construction of these articles. The language is plain and unambiguous. Giving the words therein their plain and grammatical
E meaning, the decision on this issue is for the House to take, it is final when taken and the validity of the proceedings cannot be questioned in any court. These articles can admit no other construction.

**[139]** Likewise, it will be recalled that in *Fan Yew Teng No. 1*, Azmi J was not inclined to accept the defendants' arguments in that case that art. 53 was
F only attracted in 'doubtful' cases of disqualification. In addressing that argument, Azmi J evidently had in mind settled canons of construction when, at p. 42 (MLJ), His Lordship observed:

> I also agree with the submission of learned Counsel for the defendants that in construing the relevant articles in the Constitution the court must
G try to give a sensible meaning of all the words. It is also a well-established canon of construction that the court should not substitute what it thinks is Parliament's intention in the place of the clear meaning of the words used so that it is not for the court to assume that Parliament has used certain words idly. Unless it is impossible to do so, the court must give effect to every word used in the Constitution … It has been suggested
H that it is only in cases where for instance a member has obtained a free pardon that a question is said to have arisen under article 53 and it is only in that instance that the House will decide. To my mind, there is no justification for that interpretation. If it is the intention of the Constitution to confine article 53 to doubtful cases only, then it would have said so clearly.

I

**[140]** Thus, if the drafters of the Federal Constitution had intended that either Houses of Parliament should have the jurisdiction to determine disqualification irrespective of the pre- and post-election dichotomy, they would have said so clearly. The reasoning is applicable to the Sarawak Constitution given that it is constitutionally required to be worded the same or with 'substantially the same effect' as the Federal Constitution. Absent any such clear indication, it is my view that the purposive canon of construction cannot be preferred over its literal counterpart.

**[141]** Further, central to the concept of the literal rule, courts must also construe legislation or a Constitution as a whole, and in its context. In my respectful view, the Sarawak Constitution read in its context and in the context of the Federal Constitution does not support the view that the drafters had intended for the Dewan to have jurisdiction over pre-election disqualification. I say this for two reasons.

**[142]** Firstly, the entire disqualification regime must also factor in art. 118 of the Federal Constitution which reads as follows:

> Method of challenging election
>
> 118. No election to the House of Representatives or to the Legislative Assembly of a State shall be called in question except by an election petition presented to the High Court having jurisdiction where the election was held.

**[143]** The clear and plain language of art. 118 of the Federal Constitution envisions that only an election court has the exclusive jurisdiction to determine pre-election disqualification. It might be argued that the jurisdictions of the court and the Dewan or House may be reconciled to allow the former to adjudicate on pre-election dispute by limiting the jurisdiction of the courts to decide pre-election disqualification relating strictly to election offences. With respect, such argument is not supported by the clear language of the Election Offences Act 1954 [Act 5]. Pre-election disqualification is in law one of the several grounds upon which, if proved to the satisfaction of the election judge, require the court to invalidate an election result. This is apparent in s. 32(e) of the Election Offences Act 1954, which provides:

> Avoidance of election on election petition
>
> 32. The election of a candidate at any election shall be declared to be void on an election petition on any of the following grounds only which may be proved to the satisfaction of the Election Judge:
>
> ...
>
> (e) that the candidate was at the time of his election a person disqualified for election.

**[144]** The context in this regard suggests that there is a clear separation of powers between the Legislature (Federal and State) on the one side (to make decisions on post-election disqualification); and the courts on the other (to make decisions on pre-election disqualification).

**[145]** Secondly, the other indication of context suggesting that the drafters of the Sarawak Constitution had intended to conform with the pre- and post-election structure established by the Federal Constitution is apparent in art. 20 of the Sarawak Constitution which provides as follows:

> Penalty for unqualified person sitting or voting in the Dewan Undangan Negeri
>
> 20. Any person who sits or votes in the Dewan Undangan Negeri, knowing or having reasonable ground for knowing that he is not entitled to do so, shall be liable to a penalty not exceeding two hundred ringgit for each day on which he so sits or votes, which penalty shall be recoverable as a civil debt in the High Court at the suit of the State Attorney-General.

**[146]** Article 20 suggests that the Sarawak Constitution has in place a contingency that in the event a person is not entitled to sit in the Dewan by virtue of their disqualified status, then he or she shall be liable to pay a penalty for each day he or she sits in the Dewan and that such penalty shall be recoverable in the High Court as a civil debt. The context here again clearly suggests that the Sarawak Constitution, like the Federal Constitution accords fully with the pre- and post-election structure.

**[147]** Thus, having regard to the ordinary meaning of art. 19(1) of the Sarawak Constitution read in the context of the rest of the constitutional provisions, it is my considered view that the appellants' argument that this court ought to imply that the Dewan has the power to adjudicate upon pre-election disqualification is, with respect, unsupported. I would accordingly adopt the literal construction and reject the purposive construction.

**[148]** In arriving at this result, I am also guided by the doctrine of constitutionalism, limited government and the rule of law ie, that the Executive and Legislative arms of Government and their powers are strictly circumscribed by law. Only the courts may have inherent power with the view of doing complete justice and with the view of protecting its process from abuse. I am therefore constrained to reject the appellants' arguments that the powers of the Dewan to decide on pre-election disqualification may be implied under the assumption that that was what the drafters had intended (see generally *Lee Kwan Woh v. PP* [2009] 5 CLJ 631 where this court offered guidance on when to interpret constitutional provisions broadly and when to interpret them narrowly).

**[149]** For completeness, I also find it necessary to address the judgment of the Indian Supreme Court in *Election Commission, India v. Saka Venkata Subba Rao* [1953] AIR 210 ('*Saka Venkata*'). The majority of the court below relied on the judgment to arrive at its conclusions. The appellants sought to distinguish it. In that case, the plaintiff was guilty of an offence and was imprisoned for a period of seven years but was released early. His conviction was of such nature that it disqualified him from running for elections and from membership in the State Legislature. After his release, he had applied to the Indian Election Commission for exemption from the disqualification but he did not receive a reply. He nevertheless ran for election and won. Subsequent to his victory, he was informed by the Indian Election Commission that his request for exemption had been denied. On these facts, the Indian Election Commission proceeded to take legal action to have the plaintiff removed as a member of the State Assembly seat for which he had contested and won.

**[150]** To prevent his removal, the plaintiff filed a petition at the High Court substantively to argue that he could not be removed under the relevant provisions of the Indian Constitution. The learned High Court Judge accepted the argument that the plaintiff's disqualification was a pre-election one and hence such provisions of the Indian Constitution did not apply to him. The Election Commission appealed to the Supreme Court which unanimously dismissed the appeal and affirmed the decision of the High Court.

**[151]** The primary provision falling for consideration in the case was art. 192(1) of the Indian Constitution which provides:

> Decision on questions as to disqualifications of members.
>
> 192. (1) If any question arises as to whether a member of a House of the Legislature of a State **has become** subject to any of the disqualifications mentioned in clause (1) of art. 191, the question shall be referred for the decision of the Governor and his decision shall be final.
>
> (emphasis added)

**[152]** The Indian Supreme Court observed that the use of the phrase "has become" only conferred power on the Governor to make a decision on any post-election or supervening disqualification. The power did not, by virtue of the language of art. 191(2), extend to disqualifications already incurred by a person prior to his membership. Patanjali Sastri CJ observed as follows:

> The Attorney-General argued that the whole fasciculus of the provisions dealing with "disqualifications of members", *viz.*, articles 190 to 193, should be read together, and as articles 191 and 193 clearly cover both pre-existing and supervening disqualifications, articles 190 and 192 should also be similarly understood as relating to both kinds of disqualification.

A According to him all these provisions together constitute an integral scheme whereby disqualifications are laid down and machinery for determining questions arising in regard to them is also provided. The use of the word "become" in articles 190(3) and 192(1) is not inapt, in the context, to include within its scope pre-existing disqualifications also, as becoming subject to a disqualification is predicated of "a member of a B House of Legislature", and a person who, being already disqualified, gets elected, can, not inappropriately, be said to "become" subject to the disqualification as a member as soon as he is elected. The argument is more ingenious than sound.

Article 191, which lays down the same set of disqualifications for election C as well as for continuing as a member, and art. 193 which prescribes the penalty for sitting and voting when disqualified, are naturally phrased in terms wide enough to cover both pre-existing and supervening disqualifications; but it does not necessarily follow that arts. 190(3) and 192 (1) must also be taken to cover both. Their meaning must depend on the language used which, we think, is reasonably plain. In our opinion D these two articles go together and provide a remedy when a member incurs a disqualification after he is elected as a member. Not only do the words "becomes subject" in art. 190(3) and "has become subject" in art. 192(1) indicate a change in the position of the member after he was elected, but the provision that his seat is to become thereupon vacant, that is to say, the seat which the member was filling theretofore becomes E vacant on his becoming disqualified, further reinforces the view that the article contemplates only a sitting member incurring the disability while so sitting.

The suggestion that the language used in art. 190(3) can equally be applied to a pre-existing disqualification as a member can be supposed to vacate F his seat the moment he is elected is a strained and farfetched construction and cannot be accepted. The Attorney-General admitted that if the word "is" were substituted for "becomes" or "has become", it would more appropriately convey the meaning contended for by him, but he was unable to say why it was not used.

G **[153]** It is apparent from the above passage that the Supreme Court accorded the Indian Constitution a literal interpretation. Next, the Supreme Court also considered the Indian Constitution as a whole to observe that art. 193 stipulates a penalty in situations where a person knows that he ought not to sit in the State Legislature, continues to sit. For completeness, art. 193 of the Indian Constitution provides:

H

Penalty for sitting and voting before making oath or affirmation under art. 188 or when not qualified or when disqualified

193. If a person sits or votes as a member of the Legislative Assembly or the Legislative Council of a State before he has complied with the I requirements of art. 188, or when he knows that he is not qualified or that he is disqualified for membership thereof, or that he is prohibited from so

doing by the provisions of any law made by Parliament or the Legislature of the State, he shall be liable in respect of each day on which he so sits or votes to a penalty of five hundred rupees to be recovered as a debt due to the State.

**[154]** Article 20 of the Sarawak Constitution is substantially similar to art. 193 of the Indian Constitution. This further fortifies my view that a contextual and literal reading of art. 19(1) of the Sarawak Constitution suggests that it was only intended to apply to post-election disqualification.

**[155]** The appellants attempt to distinguish the decision in *Saka Venkata* from the facts of these appeals. They argue that the provisions of the Indian Constitution are vastly different from the Sarawak and Federal Constitutions. With respect, I find no merit in this argument. The only difference as far as disqualification is concerned is the authority empowered to make the decision. In Malaysia, the authority for post-election disqualification lies with the Dewan. In India, the authority lies with the Governor of the State acting on the advice of the Indian Election Commission. The differences are only to that extent. The rest of the procedure is substantially similar and I am inclined to think that the judgment in *Saka Venkata* is strong persuasive authority to support the conclusions at which I have arrived.

**[156]** Finally, the majority of the Court of Appeal appeared to rely on art. 50(2) of the Federal Constitution. They argued that a similar provision is present in the Perak State Constitution but absent in its Sarawak counterpart. The provision provides as follows:

(2) If a person disqualified for being a member of the House of Representatives is elected to that House or if a person disqualified for being a member of the Senate is elected or appointed to the Senate, or if an election or appointment to either House is contrary to art. 49, the election or appointment shall be void.

**[157]** Accordingly, the majority of the Court of Appeal reasoned that because the Federal Constitution contains art. 50(2) as does the Perak State Constitution a provision of similar effect, it further bolsters the argument that the Houses of Parliament do not have the power to determine pre-election disqualification. This is what Abang Iskandar JCA observed in paras. [86], [98] and [117] of the majority judgment:

Fourthly, the presence in the Perak Constitution provisions in art. XXXIV and art. 50(2) of the Federal Constitution, which would deal with the situation in this case quite summarily, despite the Legislative Chamber having power to determine the status of a member when a question on his qualification arises. To my mind, the presence of such provision as art. 50(2) of the Federal Constitution is a clear manifestation that the

A Dewan Rakyat has no jurisdiction to deal with a person who has been elected into the august Dewan Rakyat when he is in fact a disqualified person before he was elected. The Sarawak Constitution does not have such similar provision, definitely not in art. 18 nor 19…

B True, as the learned SAG had submitted that there would be a lacuna if the Dewan were not empowered to determine the status of the plaintiff who was a disqualified person to remain as a member in the Dewan … [a]n explicit provision like art. 50(2) of the Federal Constitution and/or art. XXXIV of the Perak State Constitution would certainly make plain as to how a person circumstanced as the plaintiff here could be dealt with…

C Even so, whilst a similar provision may appear in other State Constitutions in Malaysia, such a provision is nowhere to be found in the Sarawak Constitution. Even if it was so found, it would not support the proposition put forward by the appellants. In my view, art. 50 of the FC must apply to a post-election disqualification because of the operative words "if a member … **becomes** disqualified" (emphasis added). Article D 50(2) of the FC would then accordingly apply to make that election void. Any other interpretation would lead to a conflict with art. 118 of the FC as alluded to earlier.

**[158]** With respect, I agree with the observations of the learned judge. E Guidance in this respect may be gleaned from *Fan Yew Teng No. 1* (*supra*). While art. 50(2) renders the election or membership of a person void, as the case may be, that does not mean that such disqualification happens immediately or automatically. Article 50 must be read with art. 53 of the Federal Constitution. The Sarawak Constitution does not have a provision of similar effect with art. 50(2) of the Federal Constitution. However, that F in my considered view, does not detract or dampen the general structure of the pre- and post-election dichotomy apparent in the Sarawak Constitution when read in context of its own provisions and the provisions of the Federal Constitution.

G **[159]** For the foregoing reasons, I am of the considered opinion that on a plain and contextual reading of the Federal and Sarawak Constitutions, the pre- and post-election regime exist mutually exclusive of one another. While the disqualifying factors in art. 17(1) operate and apply to both pre- and post-election disqualification, the decision-maker in respect of each is respectively the court and the Dewan.

H **[160]** I am aware that the effect of this judgment is that the respondent though clearly disqualified, is entitled to continue sitting in the Dewan as a member. I am however not inclined to ignore the clear and unambiguous language of art. 19(1) of the Sarawak Constitution appreciated within its

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context and within the larger context of the Federal Constitution. And, as earlier stated, the Dewan has its remedy in the form of the sanctions imposable under art. 20 of the Sarawak Constitution.

**Justiciability And Parliamentary Privilege**

**[161]** Learned counsel for the appellants argued that the present dispute is non-justiciable in light of art. 72(1) of the Federal Constitution. They also placed considerable reliance on the judgment of this court in *Teng Chang Khim v. Badrul Hisham Abdullah & Anor* [2017] 9 CLJ 630 ('*Teng Chang Kim*') for the same proposition of law. Article 72(1) of the Federal Constitution provides:

> Privileges of Legislative Assembly
>
> 72. (1) The validity of any proceedings in the Legislative Assembly of any State shall not be questioned in any court.

**[162]** In *Teng Chang Kim (supra)* this court held that the power of the House to make decisions in respect of disqualification falls within the purview of art. 72(1) of the Federal Constitution and as such, it is non-justiciable before the courts.

**[163]** With respect, in the present appeals, I have determined that on the proper construction of the relevant State and Federal Constitutional provisions, the Dewan did not have jurisdiction to decide on the respondent's pre-election disqualification. As such, the decision in *Teng Chang Kim* is distinguishable as the decision of the Selangor State Legislature in that case had been over a matter which it had jurisdiction. The immunity from judicial interference under art. 72(1) of the Federal Constitution therefore clearly applied on the facts of that case. In contrast, such immunity does not arise in this case because the Dewan had no power to decide on the respondent's pre-election disqualification.

**Conclusion**

**[164]** There were seven leave questions posed, namely:

(i) Whether the Dewan Undangan Negeri of Sarawak ("the Dewan") has the power under art. 19(1) of the Sarawak Constitution to make a decision on the continued membership of an elected member whenever a question is raised in the State Assembly as to whether that member is qualified for election to the State Assembly under art. 17(1)(g);

(ii) Whether the business or proceedings of the Dewan (including but not limited to the ministerial motion on 12 May 2017) is justiciable, in view of the provisions *inter alia* of art. 19(1) of the Sarawak Constitution read with art. 72(1) of the Federal Constitution;

(iii) Whether upon proper interpretation of art. 17(1)(g) of the Sarawak Constitution, a disqualification for election to the State Assembly resulting from voluntary acquisition of foreign citizenship and the exercise of rights accorded to a foreign citizen in that foreign country, could be removed and ceased in the absence of provision in art. 17(3) or any article of the Sarawak Constitution for the removal or cessation of such disqualification;

(iv) Whether there is any conflict between art. 17(1)(g) of the Sarawak Constitution and art. 19(1) of the Sarawak Constitution and art. 118 of the Federal Constitution;

(v) Whether or not an election petition pursuant to art. 118 of the Federal Constitution is the only mode that can be utilised to challenge the appointment of a member of the Dewan;

(vi) Whether a Malaysian citizen who had acquired foreign citizenship but renounced it before the nomination of an election is qualified to be nominated as a candidate for an election in light of art. 17(1)(g) of the Sarawak Constitution; and

(vii) Whether the Dewan has the jurisdiction to decide on the disqualification of an elected member who had previously acquired a foreign citizenship though renounced it before the nomination of an election. If the answer is in the affirmative, whether such a decision of the Dewan in justiciable in light of art. 19 of the Sarawak Constitution.

**[165]** In my respectful view, these appeals may be disposed of by answering leave question (vii) in the negative and in light of such answer, I consider it unnecessary to answer the rest of the questions posed. I am also aware that the respondent, during argument, raised an allegation of a breach of natural justice at the hearing of the ministerial motion dated 12 May 2017 before the Dewan. As I have held that the Dewan had no jurisdiction to decide on his disqualification, I do not, with respect, consider it necessary to address the breach of natural justice argument.

**[166]** Based on the foregoing, I am of the view that the majority of the Court of Appeal took into account all relevant principles of constitutional interpretation based on settled authority. I do not propose to disturb that decision. I therefore dismiss these appeals with no order as to costs.

**David Wong Dak Wah CJ (Sabah & Sarawak) (dissenting):**

**Introduction**

*Preface*

**[167]** This country is a constitutional democracy regulated, constricted and circumscribed by the Federal Constitution – the supreme law of the land and a document drafted meticulously and after much thought and consideration by the founding fathers of the nation. Central to the Constitution is the doctrine of separation of powers which divides the institutions of Government into three branches: the Legislature, Executive and Judiciary. The Legislature makes the laws; the Executive put the laws into operation; and the Judiciary interprets the laws. This doctrine is the bedrock of a fair and responsible Government providing a system where each branch checks and balances the others.

**[168]** The Judiciary is armed with the power to adjudicate upon civil or criminal matters between the State and its citizens or between citizens *inter se*. Under the Westminster model of Government, the executive and legislative branches enjoy some degree of fusion. It therefore becomes all the more necessary that the judiciary remains completely independent in its judicial functions. It is the courts and only the courts which have the power to declare that one branch or the other has overstepped its powers as circumscribed by the Federal Constitution. It is therefore an integral aspect of constitutionalism and the Rule of Law that the Judiciary is endowed with the power to strike down those excessive acts. This case brings to the forefront the workings of the doctrine of separation of powers, that is, whether the legislature had exceeded his jurisdiction in declaring the respondent a disqualified person.

**[169]** Judges are appointed with the solemn duty to adjudicate disputes and to dispense pure justice through their decisions. In determining what that decision should be, we ask ourselves the question, shorn of all the legal niceties, what should be the outcome which meets the end of Justice. In this case, after having considered the well-written judgments of Court of Appeal and the High Court, I have no doubt that the minority judgment of Justice Mary Lim in the Court of Appeal is what the just outcome of this case should be. But, because the Judiciary is the protector of the Federal Constitution, it must in every case be mindful of not overstepping its own functions by attempting to legislate from the bench such that its decision can meet the most favourable yet theoretical just outcome. Hence the aforesaid question we ask ourselves, that is whether the respondent could be removed, is only one half of the equation.

**[170]** The other half is whether the so-called correct decision in this case is within the parameters of the law, in this case, the State Constitution of Sarawak read within the context of the Federal Constitution – the supreme law of the land. This second half of the equation is premised on the constitutional duty of the court to accord an interpretation which is consonant to what is provided by the clear words of the written law in terms of the jurisdiction of the State Legislature, the Sarawak State Legislative Assembly, in these three appeals. It is with this approach I shall now analyse the merits of respective submissions in seeking an answer to the second part of the equation.

*Background Facts*

**[171]** The background facts have been meticulously set out in the Court of Appeal judgment and I will not restate them. For clarity, I shall refer to all parties supporting this appeal, namely: the Honourable the Speaker of the Sarawak State Legislature, the Sarawak State Legislature itself, Dato Seri Wong Soon Koh, and the Election Commission of Malaysia as the appellants. I shall refer to Dr Ting Tiong Choon as the respondent.

**[172]** Suffice to say that the genesis of this whole ordeal is when the Sarawak State Legislative Assembly (DUN) was presented with a ministerial motion dated 12 May 2017 (MM) to disqualify the respondent as an elected member of the DUN pursuant to art. 17(1)(g) of the State Constitution of Sarawak. The DUN approved such motion and declared that the respondent was thereby disqualified and ceased to be a member of the Sarawak DUN with immediate effect. The MM was premised on the grounds that prior to being nominated as a candidate with three others to contest in the State seat on N.74 Pujut for the Sarawak State Election on 25 June 2016, the respondent had acquired Australian citizenship on 20 January 2010 and was a registered voter in Australia. Nonetheless, it is pertinent to note that it is undisputed that on 4 April 2016, the respondent had renounced his Australian citizenship and the renunciation was approved by the Australian Government. Therefore, when the respondent stood for election, he no longer possessed Australian citizenship. He was in fact a Malaysian.

**[173]** I must state at this juncture that I have no issue and in fact am in agreement with the findings of fact by the court below that the first respondent in this case is quite obviously disqualified by virtue of his taking up of Australian citizenship and his declaration of allegiance to Australia. Further, the fact that he later renounced his citizenship may never redeem him of such an offence. The language of art. 17(1)(g) is very clear in this regard. It prohibits, *inter alia*, the very act of "voluntary acquisition" of foreign citizenship. Thus, what art. 17(1)(g) prohibits is the mere act of

acquiring and not necessarily "acquiring and retaining" foreign citizenship. The fact that learned counsel for the first appellant kept emphasising that voting is mandatory in Australia, is therefore beside the point. It is an undisputed fact in these proceedings that the first respondent did voluntarily acquire foreign citizenship.

**[174]** The manner in which this case has been argued by respective counsel shows clearly the main issue is simply whether the DUN has the jurisdiction to disqualify the respondent as an elected member of the DUN pursuant to art. 17(1)(g) of the State Constitution of Sarawak on 12 May 2017. There is also, of course, the peripheral issue of breach of natural justice which I shall deal with later in this judgment.

*Decision Of The High Court*

**[175]** The learned judge in essence dealt with two issues, one: the issue of jurisdiction of the DUN in respect of the MM, second whether the respondent was accorded the due process of law, that is, the right to be heard.

**[176]** Prior to dealing with the two issues, the learned judge rightly pointed out that the decision of the DUN is justiciable and in support, referred to a decision of this court in *Dewan Undangan Negeri Selangor & Ors v. Mohd Hafarizam Harun* [2016] 7 CLJ 143 at p. 153 where it held as follows:

> [37] It is to be noted that the construction of art. 72(1) has come up for determination by our apex court a number of times. On this point it must always be borne in mind that the power of Parliament and the Legislative Assemblies of the States in Malaysia are limited by the Federal Constitution and the State Constitutions respectively. This principle is as stated by Suffian LP in the case of *Ah Thian v. Government of Malaysia* [1976] 1 LNS 3; [1976] 2 MLJ 112 at 113 which reads as follows:
>
> > The doctrine of supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of State legislature in Malaysia is limited by the Constitution, and they cannot make any law they please.
>
> [38] As regards to the application of art. 72(1), previous cases have held that the court has jurisdiction to determine whether the resolutions passed by the Legislative Assembly exceeded the constitutional provisions. In the case of *Datuk Joseph Pairin Kitingan v. Tun Datu Haji Mustapha Datu Harun* [1985] 1 LNS 7, [1987] 1 MLJ 471 the respondent had applied to the court for declarations that his appointment as Chief Minister of Sabah by the first appellant was valid and the subsequent revocation of his appointment and of the appointment of the second appellant as Chief Minister was *ultra vires* the Constitution of Sabah and therefore null and void. The appellants raised, *inter alia*, a preliminary objection that the position of the Chief Minister was a privilege of the Legislative Assembly and that since the privilege had been exercised by

A resolutions passed by the Legislative Assembly on a motion of confidence on 30 May 1985 and other matters on 3 August 1985, the issues raised by the respondent are not justiciable. The Supreme Court speaking through Abdul Hamid CJ (Malaya) in upholding the dismissal of the preliminary objection held that:

B
> The Constitution has made the Courts the ultimate interpreter of the Constitution. The Courts accordingly cannot reject a *bona fide* controversy as to whether some action denominated 'political' exceeds constitutional authority.

We cannot see any substance whatsoever in the contention that a privilege of the State legislative Assembly is involved in the matter before us or that the jurisdiction of the Court to decide the issues raised is ousted as a result of the resolutions of the Assembly passed on May 30 and August 3 respectively.

Motions of confidence or of no confidence or whatever passed in the legislative Assembly might be political ratification or rejection of the choice made but cannot, in our view, affect the primary issues of the appointment and revocation which are legal and justiciable questions clearly within the competence and judicial consideration and determination.

**[177]** In respect of the issue of jurisdiction, this is what the learned judge held:

E
> The matter now before this court relates to Sarawak State Constitution and the learned State Attorney General argued that Articles 11 and 18(2)(a) are to be read together and both Articles conjunctively applies to both pre and post-elections.

F
> The learned State Attorney General further argued that once a Malaysian citizen acquires a foreign citizenship he is "forever disqualified" under Article 17(1)(g) from being a candidate for election in the State of Sarawak or being qualified to be a member of the Dewan Undangan Negeri Sarawak, irrespective of a subsequent renunciation of that foreign citizenship. I am not persuaded by this argument. I am not prepared to read into Article 17(1)(g) something which is not there. Further it cannot be the intention of the framers of the State Constitution that a foreigner who later became a Malaysian citizen has better rights compared to a citizen by birth who acquired foreign citizenship only to renounce that citizenship later, be worse off. I agree with the Plaintiff's submission on this issue.

H
> On plain reading of Article 17(1)(g) one can easily understand from the wordings used "a person is disqualified for being elected as an elected member of the Dewan Undangan Negeri if ..." This must relate to a pre-election disqualification, it cannot be post-election. To interpret otherwise would be wrong and perverse. Any challenge to the election result based on this Article 17(1)(9) disqualification must therefore be made by way of an election petition as per Article 118 of the Federal Constitution.

Article 18(2) of the State Constitution talks of "an elected member shall also vacate his seat in the Dewan if (a) he ceases to be qualified for election as such a member of the Dewan." This can only happen subsequent to an election. If we look at the other scenario provided i.e. resignation in writing and absent without leave, these 2 are without doubt post-election scenarios. Hence Article 18(2) has to be read with Article 19(1) and not with Article 17(1)(g) as argued by the learned State Attorney General.

Having said that Article 17(1)(g) cannot be read with Article 18(2) what then is the status of the Ministerial Motion? It was brought before the Dewan pursuant to Article 17(1)(g) (which I already said is subject to Article 118 of the Federal Constitution).

I agree with the Plaintiff's submission that since the Ministerial Motion is clearly based on Article 17(1)(g), by virtue of Article 118 the Dewan has no power to disqualify the Plaintiff as the elected member.

**[178]** In respect of the issue of due process of law, the learned judge reasoned it out in the following manner:

The Plaintiff's colleague Chiew Chiu Sing sought for the matter to be stood down for half an hour or an hour for the Plaintiff to prepare his defence so that ample time be given to the Plaintiff to mount his defence and prepare the necessary documents.

The first Defendant who is the Speaker of the House refused the said request. He said the matter was already filed and heard in Court. It involved the Plaintiff and the issue had been spelt out in the Election Petition, surely the Plaintiff would be prepared for this. The Speaker said "Therefore, he is prepared".

It is to be noted that the Ministerial Motion by the 2nd Defendant was received by the Speaker the day before. I accept that the Plaintiff only had notice of it the morning of the 12h May 2017 when the House begun its session for the day.

I take view that with the matter of such importance and bearing in mind that 8,899 constituents of Pujut had voted and returned the Plaintiff as their duly elected Assemblyman and that the Plaintiff would be adversely affected if the decision of the Dewan goes against him, the least the Speaker could have done was to stand down the matter as requested for half an hour to or an hour: I am constrained to say that I agree given the magnitude of the matter, the Plaintiff was not given adequate and reasonable time to prepare his defence which must necessarily include documentation and the law. This denial to give adequate time to the Plaintiff led to a failure to observe the rules of natural justice. A proper defence I would envisage involve an explanation of what amounts to dual citizenship, an explanation on how citizenship is lost, a discussion on Article 24 and 27 and whether the Dewan is a competent forum. Bearing

A in mind that some of the YBs are not trained in law the Plaintiff will require more time. I do not think the House is equipped to hear matters of this nature, I shall explain later.

I do not think any prejudice will be caused to the mover of the Ministerial Motion if the matter was stood down for 30 minutes or so. It may
B inconvenience some members of the House but I doubt if support for the Ministerial Motion will be eroded or diminish during that short break, even without the crack of the whip. It is not explained why this matter should proceed post haste.

What the Ministerial Motion sought was in actual fact to remove the
C Plaintiff as a member of the House by way of disqualification so that a by election could be held by the 5th Defendant. It calls into question the election of the Plaintiff as the duly elected member.

I bear in mind that the Plaintiff is a medical doctor. He is not a legally trained litigator. At the election court it was his lawyers that argued his case not the Plaintiff himself. I do not agree with the Speaker's view that
D the Plaintiff is prepared.

...

I agree with the Plaintiff. The Rules of Natural Justice and procedural fairness were not adhered to. By taking an active part in the debate, the Speaker had descended into the arena of conflict and debate. He played
E an active role to promote the Ministerial Motion and in so doing is no longer seen to be acting impartial. The Plaintiff had submitted the Speaker had acted as the prosecutor and judge. And as can be seen at page 21 of the Hansard the Speaker even knew beforehand that the member for Mambong will second the Motion. This implied pre-arranged plans and
F the Speaker was aware of it.

*Majority Decision Of The Court Of Appeal*

**[179]** In the matter of whether the DUN had the jurisdiction to deal with the MM, the learned judges opined that the answer to the aforesaid issue is only one of interpretation of the relevant provisions of the Sarawak Constitution.
G The learned judges took a holistic approach in interpretation and found that art. 17 of the Sarawak Constitution only provides a set of disqualifying factors constant in nature and art. 18 sets out the circumstances in which a member's tenure in the DUN may be terminated. Article 17(1)(g) has the effect of disqualifying any person from standing in an election and by virtue
H of art. 18(2)(a), if that disqualifying act occurs whilst he is a sitting member of incurred the DUN, that member will no longer be able to remain as an elected member, thereby rendering his or her seat in the Dewan vacant. Thus, their Lordships found as a matter of construction of the relevant provisions that there is a clear demarcating line as to the point in time when
I the disqualification is incurred and by whom.

**[180]** In construing arts. 16, 17, 18 and 19 of the Sarawak Constitution, Abang lskandar Abang Hashim JCA (as he then was) opined as follows: A

> [75] It appears to me that arts. 16, 17, 18 and 19 of the Sarawak Constitution read together, have created two separate and distinct regimes, in dealing with the issue of disqualification. Articles 16 and 17 deal with disqualifications of a person prior to election or pre-election. B Articles 18 and 19 deal with disqualification of an elected member post-election. While I agree with learned counsel for the defendants that those articles do not employ the words such as 'prior' or 'pre-election' or 'post-election: I see nothing wrong in using those words to describe the plausible effects of those articles read together, in that manner. **As it has become quite clear, at least to me, each of the two regimes may involve** C **a different 'decision-maker' to determine the alleged disqualification** ... (emphasis added)

**[181]** To determine the intention of the framers of the Sarawak Constitution, Abang lskandar Abang Hashim JCA (as he then was) looked at the operative words used and this is what he said: D

> [92] The operative words used in art. 19(1) and art. 18(2)(a) of the Sarawak Constitution are 'has ceased' and 'ceases' respectively. A plain construction of those words as they are employed in those two mentioned articles must mean that the disqualification must have been incurred by a sitting member, post-election. Those words connote a E situation when a member was qualified when he was elected into the Dewan but has since, ceased to be so qualified, as he incurred a disqualification since he was elected Article 19(1) seeks to clothe the Dewan with the power to determine whether a member has ceased to be qualified to remain as a member in the Dewan. It does not refer to a person. Article 18(2)(a) again declares that a member ceases to be qualified F for election as such a member of the Dewan, when he commits any of the disqualifying acts and that includes voluntarily acquiring foreign citizenship during his time as a sitting member of the Dewan.

**[182]** Premised on the above, the learned judges held that the DUN's jurisdiction to determine the status of a 'member' for alleged disqualification G may be invoked at any time but the exercise of such power or jurisdiction by the DUN is limited to the question of whether a member of the Dewan had ceased to be qualified to be so elected. What that means is the disqualification conduct must have incurred while he is a sitting member of the DUN and not for disqualifying conduct which had occurred before his H election into the Dewan.

**[183]** In the case of the respondent's disqualification conduct of having voluntarily acquiring a citizenship of a foreign country outside of the Federation of Malaysia this is what Abang lskandar Abang Hashim JCA (as he then was) said: I

A [99] In sum, I agree with the defendants that the plaintiff had committed a disqualifying act as a person, under art. 17(1)(g) of the Sarawak Constitution. I agree too, that such an act incurred under the said provisions as contained in art. 17(1)(a) is one that cannot be forgiven, not even under art. 17(3) of the said Sarawak State Constitution. But that is the extent that I can agree with the defendants. My considered view, with
B respect, is that the august Dewan does not have the necessary jurisdiction to determine the impugned status of the plaintiff, despite his disqualified status, because that disqualification was incurred before he was elected as a member of the Dewan. The language employed in arts. 18 and 19 of the Sarawak State Constitution, does not confer on the Dewan the
C necessary jurisdiction to determine and rule on the status of the plaintiff's disqualification. My reading of the said arts. 18 and 19 is that the Dewan is only empowered to determine and rule on the status of a member of the Dewan, who has since ceased to be qualified to be so elected. It connotes a change in the position of the member as to his qualified status. A disqualification based on an act of having voluntarily acquiring a
D citizenship of a foreign country outside of the Federation of Malaysia can still bite a member, but read with art. 18(2)(a), it must need be incurred after he has been elected as a member of the Dewan. In such a situation, the Dewan would be well within its jurisdiction to determine and take a decision on the matter. Such decision so taken by the Dewan shall be final and deserving of the immunity promised under art. 72 of the Federal
E Constitution. But the factual scenario pertaining to the plaintiff before us did not fit into the one that is envisaged by arts. 18 and 19. His disqualification was incurred well before he was elected as a member of the Dewan. To say that the Dewan had the necessary jurisdiction, as did the defendants, would be a contention that was, though seemingly ingenious, was nevertheless at the same time, one that is unsound,
F strained, far-fetched and cannot be accepted Put simply, I find such contention to be untenable.

*Dissenting Judgment Of The Court of Appeal*

**[184]** Justice Mary Lim's approach on the justiciability of the decision of the
G DUN was as follows as gleaned from the following passages of Her Ladyship's grounds:

> [253] From all these decisions, it may therefore, be reasonably concluded as follows:
>
> > First, the doctrine of parliamentary privileges is intrinsically part of
> H the doctrine of separation of powers.
> >
> > Second, this doctrine is enshrined in arts. 63 and 72 of the Federal Constitution; and in the case of the State Assembly of Sarawak, further, in art. 19 of its State Constitution.

I

Third, the doctrine of parliamentary privileges means that the House and the State Assembly, as the case may be, and its members, enjoy immunity from judicial interference.

Fourth, the existence of this doctrine of parliamentary privilege is to ensure effective discharge of the functions of the House or the State Assembly by both the House and the State Assembly and its respective members.

Fifth, the courts respect that privilege and will not interfere in any parliamentary proceedings or internal management or core business of the House or State Assembly.

Sixth, the court will not interfere in those parliamentary proceedings, internal management or core or essential business of the House where such interference will impact adversely on the core or essential business of the House or the State Assembly.

[254] From the decisions discussed, in particular the earlier decisions of *Lim Cho Hock* and *Fan Yew Teng*, and the recent decision of *Teng Chang Khim v. Badrul Hisham Abdullah*, it is also plain that the matter of membership and the disqualification or loss of membership of the House or the State Assembly, as the case may be, is intrinsically related to the management and core or essential business of the House or the State Assembly. Any interference or scrutiny of any decision or related to such decisions of membership or disqualification of membership by the court will undoubtedly, adversely impact or affect the efficient discharge by the members of their parliamentarian functions. These views have prevailed through these last 60 odd years with no shift in the approach by the courts.

[255] Having therefore set out the law in relation to the matter of justiciability of the issues before the court and thereby the jurisdiction of the court to attend to the issues presented, it must follow that the present appeals turn on whether the State Assembly has jurisdiction to deal with the matters contained in the ministerial motion moved under standing order 23(1)(a); whether such matters fall within the core or essential business of the State Assembly. It goes without saying that the ministerial motion was debated and voted upon by the members of the State Assembly. And, the State Assembly resolved that the plaintiff is "disqualified under art. 17(1)(g) of the Sarawak State Constitution to be a member and has ceased to be a member of the Dewan Undangan Negeri Sarawak forthwith".

[256] If the answer is in the affirmative, then following the decisions discussed thus far, the matters raised by the plaintiff are not justiciable. The court will therefore, not interfere and will instead, abide by the doctrine of parliamentary privileges.

A ...

[332] It is my firm view that the question posed in the ministerial motion is a question which inextricably and intrinsically concerns membership of the State Assembly. Such a question is well within the mandate, authority, competence and jurisdiction of the State Assembly to question and
B deliberate, regardless when it arose so long as it falls within the terms of art. 17; falling well within the application of *Lim Cho Hock* and the two *Fan Yew Teng* cases, as affirmed by the Federal Court recently in *Teng Chang Khim v. Badrul Hisham Abdullah*. More so, when the plaintiff is seeking to enjoy and continue to enjoy the privileges of membership of the State Assembly. The matters raised in the ministerial motion and the impugned
C decision reached are well and truly internal management matters within the business of the State Assembly, taken not even outside its walls but at one of its regular sittings. Consequently, the impugned decision and the State Assembly as well as its members, enjoy parliamentary privilege rendering the matters therefore, not justiciable. To say otherwise, that the courts may scrutinise the ministerial motion and the impugned decision,
D leads necessarily to an adverse impact on the essential business of the State Assembly.

## My Decision

*Jurisdiction Of The Dewan Undangan Negeri Sarawak/Purposive Construction*

E **[185]** The primary issue in these appeals is simply whether the DUN has the jurisdiction to disqualify the respondent in this case.

**[186]** The majority judgment penned by my learned brother Abdul Rahman Sebli FCJ, with respect, takes the stand that they are not prepared to read into the Sarawak Constitution this notion of "pre-" and "post-election"
F disqualification. Having taken that stand, they are yet ready and willing to read into the Sarawak Constitution an implied power on part of the DUN to disqualify the first respondent as that is surely what the "framers of the Sarawak Constitution" had intended.

G **[187]** The aforesaid interpretation is premised on the use of the tool of construction or the so called "purposive construction" on the words appearing in the statute book. I have no quarrel that the tool of purposive construction exists. But it is trite that the purposive construction tool can only be used where there is ambiguity in the words appearing in the statute or those words connote more than one meaning. Here in my view there is
H no such ambiguity as clearly pointed out by the majority judgment in the Court of Appeal.

I

**[188]** With respect, reading something that is implied in a document as opposed to purporting to read something into a document are two entirely distinct concepts. A proper and wholesome construction of the Sarawak Constitution against the Federal Constitution clearly suggests that the drafters of the Sarawak Constitution had intended to allow the Dewan the jurisdiction to determine post-election disqualifications only.

**[189]** Further, one will recall the majority decision of the Federal Court in *PP v. Kok Wah Kuan* [2007] 6 CLJ 341; [2008] 1 MLJ 1 ('*Kok Wah Kuan*'). In rejecting the contention that judicial power is a corollary of separation of powers which doctrine is a basic feature of our Federal Constitution, the Federal Court purported to hold that ours is a system which does not strictly adopt separation of powers. With respect, the court overlooked the judgment of Azlan Shah FJ in *Loh Kooi Choon v. Government of Malaysia* [1975] 1 LNS 90; [1977] 2 MLJ 187 where His Lordship, while declining to accept the basic stricture doctrine, nonetheless expressly held that separation of powers, especially between the Judiciary and other arms of Government is a fundamental tenet of our Constitution. This court ultimately embraced separation of powers and judicial power as part of the basic structure in *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526; [2017] 3 MLJ 561 and *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 3 CLJ 145; [2018] 1 MLJ 545.

**[190]** The point here is that just because the Federal Constitution does not say something expressly, that in itself does not mean that it is not there, impliedly. If we study our Federal Constitution properly and appreciate it in context, then one would realise that there is implied in that Supreme Document the doctrine of separation of powers.

**[191]** The same is therefore true of the Sarawak Constitution if one harmonises art. 118 of the Federal Constitution with art. 19(1) of the Sarawak Constitution and realises that there was intended to be a pre- and post-election regime. Thus, it is true that one cannot "read into" the Sarawak Constitution the pre- and post-election mechanism, because such a regime is already implied. Failing to recognise it is thus in fact ignoring what the Sarawak Constitution itself provides.

**[192]** Jurisdiction is a creature of statute. In the context of administrative law, the Executive have no inherent jurisdiction save what is conferred on them by law. See: *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135, at p. 148. The same must also be true of the Legislative branch of Government. The Constitution does not authorise the Legislature to exercise any form of

inherent power. Their jurisdiction cannot be implied, unless the law very clearly allows such implication. The only body which has any inherent jurisdiction to do anything are the courts by virtue of their role to dispense justice. Thus, the approach taken by the majority of implying that the drafters would have somehow intended to enable the Sarawak State Legislature to disqualify its members is, with the greatest of respect, not supported by the weight of constitutional and administrative law. Should the Legislature wish the power to determine pre-election disqualification, they need only insert that power by constitutional amendment. The courts are not, by the very essence of their judicial role, empowered to imply such powers for the Legislature. (see: Supreme Court in *PP v. Rajappan Chinna Kounder* [1986] 1 CLJ 175; [1986] CLJ (Rep) 217; [1986] 1 MLJ 152.)

*Pre-And Post-Election Disqualification*

**[193]** The pre-election and post-election point may be explained by reference to two cases. The first is the decision of Azmi J (as he then was) in *Fan Yew Teng v. Setia Usaha, Dewan Ra'ayat & Ors* [1975] 1 LNS 39; [1975] 2 MLJ 40 ('*Fan Yew Teng*'). The other case is the decision of the Indian Supreme Court in *Election Commission, India v. Saka Venkata Subba Rao* [1953] AIR 210 (*'Rao's* case').

**[194]** The facts in *Fan Yew Teng* were briefly these. Mr Fan became a Member of Parliament after a successful election. It was shortly after his election to Parliament that he was found guilty of sedition in the Sessions Court and sentenced with a fine of $2,000. The crucial issue for determination in the case was whether Mr Fan's Parliamentary seat became automatically vacant immediately after his conviction. It is apparent, as disclosed by the facts, that his disqualification happened after he was duly elected to Parliament.

**[195]** In his judgment, Azmi J analysed arts. 48(1) and 53 of the Federal Constitution which are substantially similar to arts. 17(1) & 19(1) of the Sarawak Constitution. His Lordship made the following crucial observations, at p. 41 (MLJ):

> As far as article 48(1)(e) is concerned, there can be no dispute that the plaintiff has been sentenced to a fine of not less than $2,000 and nor has he received a free pardon. It is therefore the contention of learned Counsel for the defendants that once a member of the House of Parliament has been convicted and sentenced to a fine of not less than $2,000 and has not received a free pardon, he becomes disqualified under article 48(1) and his seat shall become vacant by virtue of article 50(1). learned Counsel for the plaintiff, however, argues that the plaintiff's conviction and sentence alone are not sufficient to disqualify him from his continued membership of the Dewan Ra'ayat and that the plaintiff is entitled to show cause against any move to exclude him from the Dewan

under article 53 of the Federal Constitution. As to article 53, learned Counsel for the defendants argues that it only applies in cases where the disqualification is doubtful, but does not apply in the present case where the disqualification is a straight-forward one.

Before going into the merits of the conflicting arguments it is necessary to appreciate that article 48(1) applies to both pre-election and as well as to post-election disqualification. In short, any person who comes within one of the subclauses (a) to (f) of this article, will not be fit to be a candidate for membership of the Dewan Ra'ayat or be an appointee of the Dewan Negara; and further, if a sitting Member of Parliament incurs any of the disqualification mentioned in the aforesaid sub-clauses, and no question arises as to his disqualification, he will be disqualified.

Secondly, it is clearly obvious that articles 50(1) and 53, as opposed to article 48(1), apply only to post-election disqualification, i.e. disqualification arising after election of a person to the House of Representatives or appointment to the Senate.

*Thirdly, it is also essential to bear in mind that, unlike the constitution of some countries with parliamentary system of government, our Constitution does not confer on the House of Representatives the power to decide elections in disputes, but only questions relating to the disqualification of members.* In the case of an election to the House of Representatives, the question of pre-election disqualification including the question of an election on the ground of disqualification of a candidate is given to the High Court under article 118, and if the disqualification is established. The election shall be void under article 50(2). (emphasis added)

**[196]** The most pertinent observation is that our Federal Constitution does not confer on Parliament the jurisdiction to determine the validity of election results. That is a matter reserved exclusively for an election court as recognised under art. 118 of the Federal Constitution.

**[197]** At this juncture, it must be understood that the list of disqualifying factors respectively in art. 48(1) of the Federal Constitution and art. 17(1) of the Sarawak Constitution apply to both pre-election and post-election situations. For example, a person who has been convicted of the relevant offence is prohibited from running for elections. It may also be the case that the person, at the time of election was not convicted of any such offence and that the conviction only happened after he became a member of Parliament. The only question is who ought to make the positive pronouncement of disqualification. According to Azmi J in *Fan Yew Teng*, in the case of the former; it would have to be a court duly constituted under art. 118 of the Federal Constitution; and in the case of the latter, the House itself may take the necessary action.

**[198]** The above distinction may be further clarified by reference to *Rao*'s case. Briefly, these were the facts. Mr Rao had been convicted of an offence and was accordingly ordered to be imprisoned for a period of seven years but he was released early. The conviction was more than enough to disqualify him under the relevant provision of the Indian Constitution from contesting. Sometime after his release from prison, a by-election was held. Mr Rao contested and won. He had however, prior to contesting, applied to the Indian Election Commission for exemption from his disqualification under the relevant statute. Only after winning the election he was informed that his application for exemption was disallowed. The Indian Election Commission accordingly invoked the relevant procedure under the Indian Constitution to have Mr Rao removed as a member of the State Assembly.

**[199]** Mr Rao responded by filing an action at the High Court seeking to halt his removal. The learned High Court Judge decided that Mr Rao's disqualification was a pre-election one and hence, the relevant procedure invoked by the Indian Election Commission did not apply to him. The matter was taken up on appeal to the Indian Supreme Court and was unanimously dismissed. This is what Patanjali Sastri CJ, in agreeing with the High Court held, *in extenso*:

> The Attorney-General argued that the whole fasciculus of the provisions dealing with "disqualifications of Members": *vis*, Articles 190 to 193, should also be read together, and as Articles 191 and 193 clearly cover both pre-existing and supervening disqualifications, Articles 190 and 192 should be similarly understood as relating to both kinds of disqualification. According to him all these provisions together constitute an integral scheme whereby disqualifications are laid down and machinery for determining questions arising in regard to them is also provided. The use of the word "become" in Articles 190 (3) and 192 (1) is not inapt, in the context, to include within its scope pre-existing disqualifications also, as becoming subject to a disqualification is predicated of "a member of a House of legislature': and a person, who, being already disqualified, gets elected, can, not appropriately, be said to "become" subject to the disqualification as a member as soon as he is elected. The argument is more ingenious than sound.
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> Article 191, which lays down the same set of disqualifications for election as well as for continuing as a member, and Article 193 which prescribes the penalty for sitting and voting when disqualified, are naturally phrased in terms wide enough to cover both pre-existing and supervening disqualifications; but it does not necessarily follow that Articles 190(3) and 192(1) must also be taken to cover both. Their meaning must depend on the language used which, we think, is reasonably plain. In our opinion these two Articles go together and provide a remedy when a member incurs a disqualification after he is elected as a member. Not only do the

words "becomes subject" in Article 190 (3) and "has become subject" in Article 192(1) indicate a change in the position of the member after he was elected, but the provision that his seat is to become thereupon vacant, that is to say, the seat which the member was filling theretofore becomes vacant on his becoming disqualified, further reinforces the view that the Article contemplates only a sitting member incurring the disability while so sitting.

*The suggestion that the language used in Article 190(3) can equally be applied to a pre-existing disqualification as a member can be supposed to vacate his seat the moment he is elected is a strained and far-fetched construction and cannot be accepted. The Attorney-Genera/admitted that if the word "is" were substituted for "becomes" or "has become" it would more appropriately convey the meaning contended for by him, but he was unable to say why it was not used.* (emphasis added)

**[200]** The above passage is more than clear for the proposition it makes. The majority in the present case attempts to distinguish *Rao*'s case on the supposed basis that:

(i) the facts of the above case are peculiar to it; and

(ii) second, that the provisions of the Indian Constitution are different.

**[201]** I think such bases to distinguish *Rao*'s case from the present one are, with respect, unfounded. The key two articles which fell for consideration in *Rao*'s case were arts. 191 and 192 of the Indian Constitution. Article 191 is not in contention in the sense that it sets out the disqualifying factors similar to our arts. 48 and 17 respectively of the Federal and Sarawak Constitutions.

**[202]** Article 192 of the Indian Constitution, however, is distinct. Clauses (1) and (2) thereof provide as follows:

(1) if any question arises as to whether member of a House of the legislature of a State has become subject to any of the disqualifications mentioned in clause (1) of article 191, the question shall be referred for the decision of the Governor and his decision shall be final.

(2) Before giving any decision on any such question, the Governor shall obtain the opinion of the Election Commission and shall act according to such opinion.

**[203]** The factor which distinguishes art. 192 of the Indian Constitution from its Malaysian counterparts is who actually makes the decision to disqualify. In the case of India, the decision lies in the hands of the Governor of the State subject to the opinion of the Indian Election Commission. In the case of Malaysia, the power to disqualify members lies exclusively with Parliament (art. 53 of the Federal Constitution), or in the case of the Sarawak State Legislature, the State Legislature (art. 19 of the Sarawak Constitution).

**[204]** Perhaps an important distinguishing factor which suggests that there is a pre- and post-election mechanism in India may arguably be art. 193 of the Indian Constitution, which reads as follows:

> If a person sits or votes as a member of the Legislative Assembly or the Legislative Council of a State before he has complied with the requirements of article 188, or when he knows that he is not qualified or that he is disqualified for membership thereof, or that he is prohibited from so doing by the provisions of any law made by Parliament or the Legislature of the State, he shall be liable in respect of each day on which he so sits or votes to a penalty of five hundred rupees to be recovered as a debt due to the State.

**[205]** However, I do not think art. 193 makes much difference. While there may be no like provision in the Federal Constitution, the decision was ultimately made on an interpretation of the language employed in art. 192(1) itself. In any event, the Sarawak Constitution contains art. 20 the effect of which is similar to art. 193 of the Indian Constitution. Speaking specifically on language, the Indian Supreme Court posited that the words "has become" suggest that the disqualification should have happened while the person is a member. Meaning, the disqualification must have been a supervening one. In that sense, the article cannot apply to a pre-election disqualification. The Indian Court suggested that the situation may have been different if the word "is" was used as opposed to "has become". This situation is no different from art. 19(1) of the Sarawak Constitution and I do not see why the rationale of the Indian Constitution ought not to apply with equal force.

**[206]** Again, for clarity, art. 19(1) reads as follows:

> If any question arises whether the Speaker or a member of the Dewan Undangan Negeri has ceased to be qualified for appointment or election as such, the decision of the Dewan shall be taken and shall be final.

**[207]** The above to me fits squarely within the elucidations of Azmi J in *Fan Yew Teng* and Patanjali Sastri CJ in *Rao*'s case. Had the more generic word "ceased" been used instead, or perhaps if the phrase, taking heed from *Rao*'s case, instead read "is disqualified for appointment", there could have been considerable support for the view the Sarawak State Legislature has the jurisdiction to disqualify the first respondent irrespective of whether the disqualification was pre- or post-election.

**[208]** There are several other reasons suggesting that the existence of a pre- and post-election regime is not a fanciful or invented insertion into the Sarawak Constitution but one which was deliberately intended by the framers of the Sarawak Constitution. This is in addition to the choice of language ie, by deliberately employing the phrase "has ceased".

**[209]** Firstly, the pre- and post-election dichotomy respects the doctrine of separation of powers. If I were to sustain the submission of the appellants it would mean that if in the event that the election court had held that the respondent is not disqualified person in the trial of election petition, the DUN would have a power to ignore the ruling of the election court and in fact can override that decision by tabling a ministerial motion as was done in this case. That proposition is a blatant disregard to the doctrine of separation of powers which I am not prepared to allow. It is also in disregard art. 118 of the Federal Constitution.

**[210]** On a proper construction of the provisions of the Federal and Sarawak Constitution, there is clear separation of powers between the High Court and the House or Dewan when it comes to the determination of disqualification. Article 118 of the Federal Constitution stipulates that no election to the House of Representatives or to the Legislative Assembly of a State shall be called in question except by an election petition presented to the High Court having jurisdiction where the election was held. The language itself suggests that the power to determine the validity of elections (which necessarily includes pre-election disqualification), is a feature exclusive to the High Court. This accords well with use of the words "has ceased" in art. 19 to suggest that once a person is already a member, the validity of his membership post-election is to be decided by the Sarawak State Legislature. In this sense, there can be no conflict as there are in fact two different decision-makers each catered to a specific situation ie, pre-election and post-election disqualification.

**[211]** The second reason also relates to the doctrine of separation of powers. Given the clear language of the art. 19(1) of the Sarawak Constitution, it would be hard to escape the conclusion that the courts may extend the Dewan's jurisdiction beyond what the Constitution itself envisions. Doing so would be to play Legislature. To illustrate, this is what Patanjali Sastri CJ continued to say in *Rao'*s case:

> It was said that on the view that Articles 190(3) and 192(1) deal with disqualifications incurred after election as a member, there would be no way of unseating a member who became subject to a disqualification **after** his nomination and **before** his election, for, such a disqualification is no ground for challenging the election by an election petition under Article 329 of the Constitution read with section 100 of the Representation of the People Act, 1951.
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> If this is an anomaly, it arises out of a lacuna in the latter enactment which could easily have provided for such a contingency, and it cannot be pressed as an argument against the respondent's construction of the constitutional provisions. *On the other hand, the Attorney-General's contention*

A *might, if accepted, lead to conflicting decisions by the Governor dealing with a reference under Article 192 and by the Election Tribunal inquiring into an election petition under section 100 of the Parliamentary statute referred to above.*

(emphasis added)

B **[212]** The first portion of the passage asserts that any lacuna in the law is for the Legislature to fill in. The courts cannot do it.

**[213]** Further and more pertinent to my second point, art. 329 of the Indian Constitution expressly and exclusively enables a person to challenge an election result *via* an election petition much like art. 118 of our Federal Constitution. This further suggests that there is clear separation of powers.

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**[214]** It is not insignificant that there was in fact an election petition and the same was dismissed by the election court on a technicality. For clarity, the grounds for the election petition reads as follows:

D Your Petitioner humbly states that the respondent is disqualified to be elected in the election of the Sarawak State constituency of Pujut (N.74) Sarawak held on 7.5.2016 from 8.00 a.m. to 5.00 p.m. for the following reasons:

(a) Your Petitioner recently discovered that at all material times, the respondent had acquired an Australian Citizenship that entitled him to exercise his right as a citizen under Section 93 of Commonwealth Electoral Act 1918;

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(b) your Petitioner also discovered that by virtue of his Australian Citizenship, the respondent till todate is a registered voter with the Australian Electoral Commission;

F (c) these conducts of the respondent is in direct violation of Articles 16 and 17(1)(g) of the Constitution of the State of Sarawak namely a person who has voluntarily acquired citizenship of, or exercised rights of citizenship in, any country outside the Federation or has made a declaration of allegiance to any country outside the Federation is disqualified from being elected as an elected Member

G of Dewan Undangan Negeri Sarawak;

(d) the nomination of the respondent on 25.4.2016 was also *ultra vires* the Articles 16 and 17(1)(g) of the Constitution of the State of Sarawak;

H (e) the declaration of the respondent in Form 5A pursuant to Regulation 4(7) of Election (Conduct of Elections) Regulations 1981 on the nomination date 25.4.2016 was false and an absolute untruth;

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(f) the respondent had failed to inform the Election Commission that he is an Australian citizen and a registered voter with the Australian Electoral Commission to determine his status and qualification to stand as a candidate for Sarawak State election for the constituency of Pujut N.74:

(g) the respondent had committed offences under Statutory Declaration Act 1960 and other relevant statutory provisions by signing a false declaration under Form 5A of the Elections (Conduct of Elections) Regulation 1981 in declaring that himself as a qualified person to be elected as a Member of Dewan Undangan Negeri Sarawak; and

(h) the respondent is completely an unqualified, unfit and untrustworthy person to be nominated and elected to represent the people of the constituency of Pujut (N. 74) Sarawak and ought not to have been returned as a member of Dewan Undangan Negeri Sarawak.

**[215]** The above grounds and reliefs are similar in nature as the ones sought in the MM which in substance called for the removal of the respondent in view of his acquired Australian citizenship. For clarity, this is the MM which reads as follows:

> Menteri Kewangan II dan Menteri Perdagangan Antarabangsa dan E-Perdangangan (YB Dato' Sri Wong Soon Koh): Tuan Speaker, this is a Ministerial motion understanding order 23(1)(a) to be read together with the standing order 3 (12). Standing Order 40(10) and Article 19(1)(g) of the Constitution of the State of Sarawak. Tuan Speaker pursuing to Standing Order 23(1)(a), I moving the following motion:
>
> > WHEREAS Article 17(1)(g) of the State of Sarawak Constitution states that a person is disqualified from being elected as an elected member of Dewan Undangan Negeri if he has voluntarily acquired citizenship of or exercised rights of citizenship in and has made declaration of allegiance to any country outside the Federation.
>
> AND WHEREAS by way of Statutory Declaration dated 22.4.2016, Honourable Member for Pujut declared that he has NOT lost the qualification to be elected as ADUN in breach of the Constitution.
>
> AND WHEREAS Member for Pujut acquired the Australian citizenship on 20.1.2010.
>
> AND WHEREAS Member for Pujut declared his allegiance to Australia at the time of acquiring the citizenship.
>
> AND WHEREAS Member for Pujut exercised his rights as a citizen by registering as a voter with the Australian Electoral Commission.

AND WHEREAS Member for Pujut was declared bankrupt twice in Australia.

AND WHEREAS Member for Pujut is completely unqualified, unfit and untrustworthy individual to be nominated and elected to represent the people of Sarawak.

AND WHEREAS as a result of his voluntary acts, Member for Pujut has ceased to be member of Dewan Undangan Negeri Sarawak due to the breaches of Article 17(1)(g) of the Constitution.

Therefore, it is moved that this House hereby resolves that:

> Member for Pujut is disqualified under Article 17(1)(g) of the State of Sarawak Constitution to be a member and has ceased to be a member of the Dewan Undangan Negeri Sarawak forthwith ...

**[216]** As stated above, the MM reflects what was asked for in the election petition which was dismissed by the election court. In my considered view, it is of no relevance that the election petition was dismissed due to a technicality. What is relevant is that there was no appeal by the appellants herein which in my view would simply mean that they accepted the decision of the election court and would be disbarred from bringing this matter before the DUN by virtue of the concept of *res judicata*. To decide otherwise would mean the respondents can have a second bite of the cherry where a normal litigant would be barred in court to do so. My view is consistent and in consonant with the doctrine of separation of powers.

**[217]** Thus, for the foregoing reasons, it is my considered view that as the provisions of the Sarawak State Constitution presently stand, there was no basis for the third appellant to raise the MM as art. 19(1) of the Sarawak Constitution clearly does not confer power on the Sarawak State Legislature to determine pre-election disqualification.

**[218]** In the circumstances, I decline, simply in the guise of doing justice by the DUN on the facts of this case, to make any pronouncement that the DUN are implied to have some power which the very settled structure of our Federal and Sarawak Constitutions do not otherwise seem to imply.

*Breach of Natural Justice*

**[219]** Though this matter requires no deliberation from me in view of my finding that the DUN had no jurisdiction to entertain the MM, however for completeness and as it is a matter of public importance, I intend to express my views on this issue.

**[220]** First and foremost, let me say this. It is without doubt that the concept of "breach of natural justice" is one of the fundamental pillars of the rule of law which is part of the basic structure of our Federal Constitution. What that means is this. Though the separation of powers doctrine applies between the Judiciary and the Legislature, this separation in my view is subject to the Federal Constitution as it is the supreme law of the land. In other words, if the respondent had not been given a fair hearing and thus became a victim of a breach of natural justice, there is no impediment to the court intervening as the Legislature is constitutionally bound to adhere to the rule of law. Any contrary view would lead to anarchy and lawlessness – a result which the courts must prevent at all cost. In the present case, the respondent had lost his right to represent the people of his constituency and they, the people, have spoken clearly whom they want as their representative. The rights affected are actually the rights of the voters in Pujut.

**[221]** The Legislature as well as the Executive are subject to the prohibitions prescribed in the Federal Constitution. I can do no better than to refer to what Barwick CJ said in *Cormack v. Cope* [1974] 131 CLR 447:

> ... [w]hilst it may be true the Court will not interfere in what I would call the intra-mural deliberative activities of the Parliament, it has both a right and a duty to interfere if the constitutionally required process of law-making is not properly carried out ...

**[222]** What I am here saying, or advocating is purely and simply a jurisdictional point. Any statutory body would be acting without jurisdiction if they acted in breach of the rule of law, in this case, the failure to accord the respondent the right to be heard.

**[223]** Was there a breach here? There was a finding of fact by the trial judge, hence the question is whether those findings are so perverse that they do not stand up to reasonableness. Having looked at the Hansard, I see no reason to depart from the findings of the trial judge.

**[224]** Much has been made of the fact that the respondent was less than candid in his replies to questions raised by the honourable members in the DUN. It was not, with respect, a simple answer of 'Yes' or 'No' to the question of whether he had acquired Australian citizenship. It is more than that as we have found out. It was a question of jurisdiction of the DUN. He may have been less than candid, but the point of the whole matter is whether he was given a chance to defend himself in a manner as was done in this originating summons in the High Court, Court of Appeal and this court.

**[225]** The fact of the matter is that five out of the 13 judges are of the opinion that the DUN did not have the jurisdiction to disqualify him. This divergence of opinions by the judges, including that of Chief Justice of the Federal Court who found that the DUN lacked jurisdiction, speaks for itself. It is just not a simple matter at all. And to deprive the respondent of having the requested half an hour to prepare his defence is, in my view, a breach of natural justice.

**[226]** I am fully aware that the Legislature operates independently but no statutory body in this country is immune from the doctrine of the rule of law, a concept which is very much part of the Federal Constitution. The might of a super majority of a sitting government in the House, with respect, must be used within the confines of the Federal Constitution. As pointed out by the learned judge, no prejudice would be caused to anyone had the respondent be given the half hour requested.

**[227]** The sum of it all is aptly put by the learned judge when he pointed out that the issue of jurisdiction should have be ventilated in the election Court and not in the DUN.

**Conclusion**

**[228]** The majority seems to be persuaded by the notion that the first respondent ought not to be allowed to continue to sit in the Dewan as a State Assemblyman by virtue of art. 17(1)(g) of the Sarawak Constitution. This is something all can sympathise with. However, the larger and pivotal question is whether the law allows it. In my construction of the Sarawak Constitution, there is indeed implied a pre- and post-election regime. Refusing to recognise this is refusing to accept that the Sarawak Constitution says what it says.

**[229]** Next, the majority decision, in my respectful view, sets two dangerous precedents. Generally, it suggests that courts may purport to insert their own subjective interpretation into written law under the guise of a "purposive reading" which is otherwise unsupported by the law. Specifically, the decision suggests that the jurisdiction of a non-judicial body which is otherwise circumscribed strictly by law, may be extended by implication and against the grain of the structure the drafters had themselves intended. As I have said, such approach is entirely unsupported by settled law and principle.

**[230]** This is simply a case which requires the court to give to the words used their natural meaning as they do not connote any ambiguity at all. The words say what they say, and they mean what they say. Not to give the words their natural meaning would be giving a meaning not reflected in the words which the court cannot and must not do as its role is to interpret and not make laws. With great respect, it can be said that the English language has

been turned 'upside down'. Purposive construction has never meant "construction with a purpose". One cannot bend the language of an Act, much less a Constitution, on a supposition that such an interpretation is what the drafters had intended.

**[231]** Seven leave questions were posed, and they are as follows:

(i) Whether the Dewan Undangan Negeri of Sarawak ("the Dewan") has the power under art. 19(1) of the Sarawak Constitution to make a decision on the continued membership of an elected member whenever a question is raised in the State Assembly as to whether that member is qualified for election to the State Assembly under art. 17(1)(g);

(ii) Whether the business or proceedings of the Dewan (including but not limited to the ministerial motion on 12 May 2017) is justiciable, in view of the provisions *inter alia* of art. 19(1) of the Sarawak Constitution read with art. 72(1) of the Federal Constitution;

(iii) Whether upon proper interpretation of art. 17(1)(g) of the Sarawak Constitution, a disqualification for election to the State Assembly resulting from voluntary acquisition of foreign citizenship and the exercise of rights accorded to a foreign citizen in that foreign country, could be removed and ceased in the absence of provision in art. 17(3) or any article of the Sarawak Constitution for the removal or cessation of such disqualification;

(iv) Whether there is any conflict between art. 17(1)(g) of the Sarawak Constitution and art. 19(1) of the Sarawak Constitution and art. 118 of the Federal Constitution;

(v) Whether or not an election petition pursuant to art. 118 of the Federal Constitution is the only mode that can be utilised to challenge the appointment of a member of the Dewan;

(vi) Whether a Malaysian citizen who had acquired foreign citizenship but renounced it before the nomination of an election is qualified to be nominated as a candidate for an election in light of art. 17(1)(g) of the Sarawak Constitution; and

(vii) Whether the Dewan has the jurisdiction to decide on the disqualification of an elected member who had previously acquired a foreign citizenship though renounced it before the nomination of an election. If the answer is in the affirmative, whether such a decision of the Dewan in justiciable in light of art. 19 of the Sarawak Constitution.

A **[232]** For the reasons I have stated in this judgment, and if I may I echo the learned Chief Justice, these appeals may be determined by answering the first part of leave question (vii) in the negative. This leaves it unnecessary to answer the rest of the leave questions.

B **[233]** Based on the foregoing, it is my considered view that the majority judgment of the Court of Appeal rightly identified the sole issue to be one of jurisdiction and that the right conclusions were arrived at on the correct application of the law. The issue of immunity of the DUN under art. 72(1) of the Federal Constitution does not arise because the Dewan in the first place did not have jurisdiction to disqualify the respondent. I therefore find C there to be no other alternative but to affirm the majority decision and judgment of the court below, and I accordingly dismiss these appeals with no order as to costs.

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